No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

ROBERT HOLMES,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Avery T. Waterman, Jr.
Counsel of Record
Jennifer West Vincent
PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.
NationsBank Building
12350 Jefferson Avenue, Suite 360
Newport News, Virginia 23602
(757) 223-4500

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

I

Is a Benefits Review Board's unanimous Decision and Order on the merits in favor of Petitioner following its adverse affirmance by operation of law under an "appropriations measure" void for lack of jurisdiction, or is it a *de facto* reconsideration and modification under pre-existing substantive law and regulations that altered the limitation periods flowing therefrom?

II

Were Petitioner's Motion for Reconsideration and Petition for Review filed timely?

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Petitioner, Robert Holmes, respectfully prays that a writ of *certiorari* issue to review the opinion of the United States Court of Appeals for the Fourth Circuit issued on June 12, 2003.

OPINIONS BELOW

On February 3, 2000, the Administrative Law Judge ("ALJ") entered Decision and Order Denying Benefits to Claimant. 37a. On March 16, 2001, the Benefits Review Board ("BRB") entered unpublished Decision and Order, vacating and remanding the ALJ's Decision and Order. 20a. On April 4, 2001, the BRB entered unpublished Order, vacating its 3/16/01 Decision and Order. 16a. On May 7, 2001, the BRB entered unpublished Order, denying Motion for Reconsideration of Holmes. 11a. On June 12, 2003, the Fourth Circuit Court of Appeals entered unpublished *per curiam* Opinion, dismissing the Petition for Review of Holmes. 1a. On December 9, 2003, the Fourth Circuit entered Order, denying Petition for Panel Rehearing and Petition for Rehearing *En Banc*. 53a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered June 12, 2003, dismisses the Petition for Review. Petitioner timely filed for rehearing by panel and *en banc*, which was denied on December 9, 2003. This petition for *certiorari* was filed within 90 days. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

20 C.F.R. §802.406 provides, in pertinent part:

A decision rendered by the Board pursuant to this subpart shall become final 60 days after the issuance of such decision unless a written petition for Review praying that the order be modified or set aside, pursuant to section 21(c) of the LHWCA, is filed in the appropriate U.S. court of appeals prior to the expiration of the 60-day period herein described, or unless a timely request for reconsideration by the Board has been filed as provided in Sec. 802.407. If a timely request for reconsideration has been filed, the 60-day period for filing such petition for review will run from the issuance of the Board's decision on reconsideration.

20 C.F.R. §802.407 provides, in pertinent part:

a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to Section 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.

(b) ***

(c) Except as provided in Sec. 801.301(d), even where no party has suggested reconsideration *en banc*, any permanent member may petition the permanent Board for reconsideration *en banc* of a panel decision.

(d) Reconsideration *en banc* shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

Omnibus Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, §1(a) (1), 114 Stat. 2763, 2763A-10 (2000) provides, in pertinent part:

> That any such decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals....

STATEMENT OF THE CASE

Holmes claimed against his employer under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901, *et seq.* ("LHWCA"). The ALJ held his claim uncompensable and he appealed to the BRB.

Because the ALJ's decision was pending review by the BRB for more than one year, it automatically was "considered affirmed" on March 7, 2001, by operation of an "appropriations measure," the Omnibus Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, §1(a)(1), 114 Stat. 2763, 2753A-10 (2000) ("Public Law 106-554"). However, on March 16, 2001, *sua sponte*, three members of the BRB issued a unanimous Decision and Order on the merits, vacating the ALJ's decision and remanding. Although not so styled, that BRB Decision and Order necessarily constituted a *de facto* reconsideration and modification of its then-existing affirmance by law, as permitted by 20 C.F.R. §802.407.

On April 4, 2001, *sua sponte*, the BRB vacated its 3/16/01 Decision and Order, erroneously believing it lacked authority to issue the same. 17a. Accordingly, as provided by §802.407, Holmes timely moved for reconsideration of the 4/4/01 Order of vacation on April 9, 2001. On May 7, 2001, the BRB denied his Motion, erroneously believing that it was "without authority to review the administrative law judge's findings of fact and conclusions of law ['affirmed by operation of law'] by way of a motion for reconsideration." 13a.

On June 8, 2001, Holmes timely petitioned the Fourth Circuit to review the BRB's 5/7/01 Order, which upheld its 4/4/01 Order vacating its unanimous 3/16/01 Decision and Order in his favor on the merits. *Sua sponte*, the Fourth Circuit raised the timeliness of Holmes' Motion for Reconsideration and, in turn, of his Petition for Review. On appellate review, Respondent,

Director of the Office of Workers' Compensation Programs ("Director"), did not advance any interpretation about timeliness by brief or oral argument.

The Fourth Circuit erroneously held both the Motion and the Petition untimely, based on its incorrect treatment of the BRB's unanimous 3/16/01 Decision and Order on the merits. It held erroneously that the affirmance by operation of Public Law 106-554 rendered the BRB subsequently addressing and deciding the merits "void." Compounding the error, the Fourth Circuit found that the time limitation for petitioning for review ran from the BRB's affirmance by law (rather than from its subsequent decision on the merits) and, correspondingly, that Holmes' 4/9/01 Motion for Reconsideration and the BRB's 5/7/01 Order of denial did not toll the same, as provided in 20 C.F.R. §802.406.

ARGUMENT

The pertinent law and regulations as interpreted by the BRB and Fourth Circuit must be scrutinized through the lens of the LWHCA's "beneficent purposes and humanitarian nature." There is a "mandate to construe broadly its provisions so as to favor claimants in the resolution of benefits cases." *Matulic v. DOWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998).

THE FOURTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE NINTH CIRCUIT ON THE SAME IMPORTANT MATTER.

In *Ramey v. Stevedoring Servs. Of Amer.*, 134 F.3d 954 (9th Cir. 1998), adverse ALJ decisions were affirmed by operation of law against two LHWCA claimants.[1] Both moved for reconsideration by the BRB and, upon denial, petitioned for review by the circuit court. Significantly, as in the matter *sub judice*, their Petitions for review were filed within 60 days of denial of reconsideration, but beyond 60 days from affirmance by law. 134 F.3d at 957.

Similar to the matter *sub judice*, the employers in *Ramey* argued that "Public Law [106-554] divested the Board of jurisdiction so that claimants' motions for reconsideration were of no effect and did not toll the time for filing;" and that the circuit court did "not have jurisdiction" because the petitions for review were filed more than 60 days after the BRB affirmances by operation of law. 134 F.3d at 958. The Ninth Circuit Court of Appeals in *Ramey* gave "considerable weight" to the interpretation of the Director that there was a "lack [of] jurisdiction to consider the merits of these cases." *Id.* But it nonetheless rejected that there was no jurisdiction due to the Public Law and found that the motion for reconsideration "tolled the sixty day period for filing petitions for review," noting that "[w]hatever deference we owe the Director's interpretation 'stops short of contravening plain statutory language'." *Id.* At 959.

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1 *Ramey* construed the original predecessor statute to Public Law 106-554. 9a.

The Ninth Circuit in *Ramey* explained that the "LHWCA provides a mechanism for the [BRB] to reconsider a panel decision;" that the BRB's regulations plainly detail the same; and that "nothing in [Public Law 106-554] indicates it was intended to rewrite this aspect of the regulatory structure." *Id.* at 158.

> Congress provided in Public Law [106-554] that when the Board fails to issue a decision within a year, the parties have the opportunity to pursue review in the courts of appeal instead of facing further months or years of delay. Nothing in Public Law [106-554], however, purports to deprive parties of other options, including motions for reconsideration. We decline to read an appropriations act so broadly that we deprive the parties of established rights.

Id. Although the BRB reconsideration after affirmance by operation of law upheld in *Ramey* was requested by a party, while in the matter *sub judice* it was *sua sponte*, both modes of reconsideration are provided by the same LHWCA regulatory framework. 20 C.F.R. §802.407.

The Fourth Circuit's opinion in the matter *sub judice* conflicts with *Ramey*. Contrary to the Ninth Circuit, the Fourth Circuit erroneously held that "the plain language of Public Law 106-554" rendered the BRB addressing and deciding the merits after its affirmance by operation of law "void" for lack of

jurisdiction.[2] 8a. Furthering the inconsistency, the Fourth Circuit also found erroneously that the 60-day period for petitioning for review ran from the

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[2] Significantly, in holding the BRB's unanimous 3/16/01 Decision and Order on the merits "void," the Fourth Circuit placed undue emphasis on the affirmance by operation of law being a "*final* order." 8a (emphasis in original). The word "final" does not mean "unalterable" in this context, any more than it does in the context of decisions on the merits. It merely means that affirmances by operation of law, like affirmances (and reversals) by a merits decisions, are "final" orders for purposes of reconsideration and/or petition for review. *Ramey*, 134 F.3d at 958-959. Just as there is no real dispute that "final" orders by merits decisions still are subject to reconsideration by party motion or *sua sponte*, there can be no genuine dispute that "final" orders by operation of law are subject to reconsideration, under the same LHWCA regulatory framework of 20 C.F.R. 802.407.

Similarly, in rejecting the 3/16/01 Decision and Order as a *de facto* reconsideration, the Fourth Circuit placed undue weight on the BRB being "unaware that it had affirmed the ALJ's decision by operation of law on March 7, 2001." 8a (emphasis added). "Ignorance of the law" is no more an excuse for the BRB than it is for Holmes: the BRB properly is charged (by law) with knowing contemporaneously its affirmance by law. Moreover, the BRB ostensibly being "unaware" of its prior affirmance by operation of law is exactly what renders the BRB's subsequent reversal on the merits a *de facto* reconsideration (despite it not being so denoted). That is to say, given that there already had been an initial BRB decision by operation of law, the BRB's subsequent decision to the contrary on the merits necessarily amounted to a reconsideration in fact of the earlier decision. The fact that on its face the BRB's 3/16/01 Decision and Order overlooked the automatic affirmance simply does not change that after its decision by operation of law on March 7, 2001, the BRB considered again in fact what it already had decided and, upon such *de facto* reconsideration, decided it differently. It is irrelevant that the actual reconsideration was the product of some oversight; the only material (and dispositive) point is that there was, in fact, a further (new) consideration on the merits and a decision thereon.

affirmance by operation of law; that the BRB's unanimous 3/17/01 Decision and Order on the merits and its 4/4/01 Order of vacation were irrelevant; and that Holmes' 4/9/01 Motion for Reconsideration and the BRB's 5/7/01 Order of denial did not toll the limitation period. 8a-9a. Contrary to the Ninth Circuit, the Fourth Circuit concluded that your Petitioner was untimely and that it lacked jurisdiction. 9a.

Although not cited by the Fourth Circuit, another panel of the Ninth Circuit and the Third Circuit Court of Appeals also have decided in conflict. *Burton v. Stevedoring Servs., Inc.*, 196 F.3d 1070 (9th Cir. 1999) and *DOWCP v. Sun Ship, Inc.*, 150 F.3d 288 (3rd Cir. 1998). Those earlier decisions stated that "the Board's decision is void if it did not comply with the Appropriation Act." 196 F.3d at 1074; 150 F.3d at 291. Significantly, however, both opinions turn on disputes over how to count the one-year period of the "appropriations" law and simply do not address the issue at bar whether the "appropriations measure" repeals by implication the longstanding LHWCA regulatory framework providing for reconsideration on motion and *sua sponte*.

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

There is conflict with two lines of this Court's federal authority. First, the Fourth Circuit's opinion conflicts with *Tennessee Valley Authority v. Hill*, 437, U.S. 153 (1978). In *Tennessee Valley*, this Court strongly

disfavored an "appropriations measure" repealing by implication any pre-existing legal framework. 437 at 190–191. Indeed, the Ninth Circuit in *Ramey* cited *Tennessee Valley* as authority for the public (appropriations) law in question not divesting the BRB of its jurisdiction and decision-making authority and, concommitantly, Petitioners of established rights. 134 F.3d at 958–959. Contrarily, the Fourth Circuit in the matter *sub judice* held that automatic affirmance by operation of Public Law 106-554, an "appropriations measure," rendered subsequent action by the BRB "void," *i.e.*, the BRB without the continuing jurisdiction provided it by the LHWCA and its regulatory framework. 8a.

Second, the Fourth Circuit's opinion conflicts with *ICC v. Brotherhood of Locomotive Egn'rs*, 482 U.S. 270 (1986) and *Bowman v. Loperena*, 311 U.S. 262 (1940), both of which held that a lower tribunal reopening, reconsidering and deciding a matter on the merits – even if "late" – triggered rights of further review on a new (later) limitations timetable. *Locomotive Egn'rs* pronounced, "When the Commission reopens a proceeding for any reason and after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order…is reviewable on its merits." 482 U.S. at 278 (emphasis added). *Bowman* mandated that despite "considering the merits ['late'],…time for appeal runs from the date thereof." 311 U.S. at 266. Indeed, other panels of the Fourth Circuit itself have ruled similarly. *E.g.*, *Betty B. Coal v. DOWCP*, 194 F.3d 491 (4th Cir. 1999)(holding that the "bright line" is "the agency's 'formal disposition' controls"), cited by the Fourth Circuit in the matter *sub*

judice; and *DOWCP v. Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990) (holding that the period for filing a Petition for Review dates from the last board decision). But in the matter *sub judice*, the Fourth Circuit simply ignores the BRB having reopened, reconsidered and decided this matter on the merits by its unanimous 3/17/01 Decision and Order, its 4/4/01 Order of vacation and its 5/7/01 Order denying the Motion for Reconsideration (and the new appellate deadline necessarily triggered thereby), and deems the Petition for Review untimely (based on the affirmance by operation of "appropriations" law on March 7, 2001).

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Historically, there has been a backlog of cases pending decision on the merits by the BRB. When the predecessor of Public Law 106-554 first became effective, "hundreds of pending appeals from administrative law judges' decisions were summarily affirmed without Board review." *Ramey*, 134 F.3d at 957. The matter *sub judice* shows that the BRB's chronic backlog and affirmances by operation of "appropriations" law continue.

Fortunately, the LHWCA and its regulatory framework expressly provide for BRB reconsideration on the merits, by party motion and *sua sponte*; and certainly decisions on the merits are much preferred to ones by operation of law. Aggrieved claimants and employers should not be divested of these valuable

federal rights by "appropriations measure" and judicial fiat. The important federal question of whether a BRB's unanimous Decision and Order on the merits in favor of Petitioner following its adverse affirmance by operation of "appropriations" law is void for lack of jurisdiction, or is a *de facto* reconsideration and modification under the LHWCA and its regulatory framework that alters the limitations periods flowing therefrom, should be settled by this Court now.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of *certiorari* issue to review the opinion of the United States Court of Appeals for the Fourth Circuit on June 12, 2003.

Respectfully submitted,
ROBERT HOLMES

Avery T. Waterman, Jr., Esq.
Counsel of Record
Jennifer West Vincent, Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
(757)223-4555 TEL
(757)249-3242 FAX

Counsel for Petitioner

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1761

ROBERT HOLMES,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS,
Respondents.

On Petition for Review of an Order of the Benefits Review Board. (00-592)

Argued: April 1, 2003
Decided: June 12, 2003
[ENTERED: JUNE 12, 2003]

Before NIEMEYER, MOTZ, and GREGORY, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

ARGUED: Avery Tillinghast Waterman, Jr., PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C., Newport News, Virginia, for Petitioner. Richard John Barrett, VANDEVENTER BLACK, L.L.P., Norfolk, Virginia, for Respondents. **ON BRIEF:** Jennifer West Vincent, PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C., Newport News, Virginia, for Petitioner.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert Holmes filed a claim against his employer, Virginia International Terminals ("VIT"), under the Longshore and Harbor Workers Compensation Act (the "LHWCA"). Holmes claims that VIT violated the LHWCA by failing to pay his disability claims derived from an alleged work-related psychological injury. An Administrative Law Judge ("ALJ") heard Holmes' claim and concluded that his disability claims were not compensable under the LHWCA. Holmes then appealed that decision to the Benefits Review Board ("BRB"), which affirmed the ALJ's decision pursuant to Public Law 106-554. After the BRB denied his motion for reconsideration, Holmes filed this petition for review. For the reasons that

follow, we conclude that we lack jurisdiction to decide the substantive merit of Holmes' claim and therefore dismiss his petition for review.

I.

VIT employed Holmes as a "header," the leader of a gang of three workers responsible for loading and unloading cargo. Bruce Sanders was Holmes' immediate supervisor. Holmes claims that Sanders started harassing him in 1996 by: (1) opposing Holmes' promotion to header; (2) refusing to grant Holmes' gang "desirable overtime assignments"; and (3) falsely accusing Holmes' gang of damaging freight. Holmes reported Sanders' behavior to Greg Kubu, Sanders' immediate supervisor, but Kubu did not take any action.

Holmes claims that, on Friday, February 6, 1998, Sanders falsely accused him and his crew of not doing any work that day. Later the same day, Sanders accused Holmes of sleeping on the job. Despite Holmes' protestations that he was not sleeping on the job, Sanders reported him to Kubu. Kubu discussed the Holmes matter with Kevin Howard, the union business agent and president, who scheduled a meeting for the following Monday, February 9, 1998, to discuss Sanders' allegations with Holmes, Sanders, and company management. Holmes testified that he then became the "butt of jokes and harassment" from his co-workers, who allegedly teased him about "sleeping on the job."

On Monday morning, Holmes learned that his meeting with Howard and company management had been rescheduled for later that evening because Howard had work to do. At the end of the afternoon, Holmes learned that the evening meeting was also rescheduled. Holmes testified that after VIT cancelled the evening meeting, he began to suffer anxiety because he was concerned about why VIT was "stalling and refusing to meet with him." (Appellant's Br. at 12). Holmes' physician, Dr. Sutton, examined Holmes that evening and diagnosed him with depression and anxiety disorder, ordered him to stay home from work, and referred him to a mental health specialist. Dr. Leonard Holmes, a psychologist, and Dr. Lewis Taylor, VIT's physician, both confirmed that Holmes was suffering from job-related stress and depression. Both Dr. Holmes and Dr. Taylor recommended that Holmes not work in his current job setting. Holmes remained out of work until September 28, 1998, at which time he returned to VIT and accepted an offer of a lower paying position at another job site.

More than a year and a half later, on August 4, 1999, Holmes finally met with company management to discuss the February 6, 1998 incident. According to Holmes, this meeting did not resolve any of the issues surrounding Sanders' allegations. It was during this meeting that Holmes learned that he was being replaced as gang header. Shortly thereafter, he filed a claim under the LHWCA, alleging that he had incurred a work-related psychological injury, and that as a result, VIT was required to pay temporary total

disability from February 9, 1998, to September 28, 1998, and permanent partial disability from September 29, 1998, to the present.

In August 1999, Administrate Law Judge Richard Malamphy heard Holmes' claims. The ALJ issued a decision on February 3, 2000, denying Holmes' request for benefits. In his decision, the ALJ concluded that Holmes was not entitled to benefits because VIT's response to Sanders' "sleeping on the job accusation" was a legitimate personnel action. The ALJ further determined that "the temporal relationship between Holmes' illness and the events of February 6 and 9, 1998[,] indicate that it was the legitimate personnel action that resulted in Holmes' disability." Specifically, the ALJ noted that "only after the events of February 9, 1998, which have already been established as a legitimate personnel action, did Holmes seek any kind of psychological treatment." Thus, the ALJ concluded that Holmes was not entitled to benefits because his injury "was wholly a result of a legitimate personnel action."

On March 7, 2000, Holmes appealed the ALJ's decision to the BRB. Because the BRB failed to issue a decision by the one-year anniversary of Holmes' appeal to the BRB, the ALJ's decision was deemed affirmed by operation of law on March 7, 2001.[1] However, on

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[1] Public Law 106-554, § 1(a)(1)[Title 1] provides, in relevant part, "[t]hat any such decision pending review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals. . . ."

March 16, 2001, the BRB issued a decision reversing and remanding the ALJ's decision.

On April 4, 2001, the BRB issued an order withdrawing its March 16, 2001 decision. In the April 2001 order, the BRB noted that it had failed to issue an opinion within the one-year time limitation imposed by law, and thus, the ALJ's decision was deemed affirmed by operation of law on March 7, 2001. Holmes then filed a motion for reconsideration on April 9, 2001,[2] which the BRB denied on May 7, 2001. The BRB explained that "[i]nasmuch as the administrative law judge's decision was affirmed by operation of law on March 7, 2001, the Board is without authority to review the [ALJ's] findings of fact and conclusions of law by way of a motion for reconsideration." On June 8, 2001, Holmes filed this petition for review.

II.

Before we can reach the merits of Holmes' claim, this Court must first determine whether it has jurisdiction to decide the issue presented. *See Betty B Coal Co. v. DOWCP*, 194 F.3d 491, 495 (4th Cir. 1999) ("[W]e have a special obligation to satisfy ourselves, before deciding anything substantive, that we do have jurisdiction."). To this point, VIT argues that this Court lacks

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[2] It was unclear from the record whether Holmes filed his motion for reconsideration on April 6, 2001, or April 9, 2001. However, at oral argument Holmes' counsel confirmed that the motion for reconsideration was filed on April 9, 2001.

jurisdiction because Holmes did not timely file his petition with this Court. For the reasons that follow, we agree.

20 C.F.R. section 802.406 governs the time period in which a petitioner may petition this Court for a review of a BRB decision. Under § 802.406, "[a] decision rendered by the Board pursuant to this subpart shall become final 60 days after the issuance of such a decision.. . ." A motion for reconsideration timely filed, however, tolls the deadline for filing a petition for review. Thus,"[i]f a timely request for reconsideration has been filed, the 60-day period for filing such petition for review will run from the issuance of the Board's decision on reconsideration." 20 C.F.R. § 802.406. Motions for reconsideration must be filed with the BRB within 30 days from the filing of the BRB's initial decision. *See* 20 C.F.R. § 802.407 ("Any party-in-interest may, within 30 days from the filing of a decision . . . request reconsideration of such decision by those members who rendered the decision.").

In this case, the BRB affirmed the ALJ's decision by operation of law on March 7, 2001, the one-year anniversary of Holmes' appeal to the BRB. Public Law 106-554 requires:

> [A]ny such decisions pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the *final* order of the Board for purposes of obtaining a review in the United States courts of appeal[ ] *sic*. . . .

LHWCA, Pub. L. No. 106-554, § 1(a)(1), 114 Stat. 2763, 2763A-10 (2000) (emphasis added). Applying the plain language of Public Law 106-554 to the facts in this case requires this Court to conclude that the BRB's March 16, 2001 written opinion is void because the BRB affirmed the ALJ's decision by *final* order on March 7, 2001, the one-year anniversary of Holmes' appeal to the BRB.[3] Thus, under § 802.406, March 7, 2001, is the date from which the statute of limitation should begin to run for any petition for review filed with this Court.

Holmes had 60 days from March 7, 2001, or until May 6, 2001, to petition this Court for review of the ALJ's decision. *See* 20 C.F.R. § 802.406. However, Holmes did not file his petition for review with this Court until June 8, 2001. Thus, his petition for review was not timely, and this Court does not have jurisdiction to decide the substantive merit of his claim.

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[3] Holmes argues that, pursuant to § 802.407, the BRB's March 16, 2001 written decision on the merits of Holmes' appeal may be considered a "de facto" or "sua sponte" reconsideration of its affirmance of the ALJ's decision under Public Law 106-554. We find this argument unpersuasive. At the time the BRB issued its March 16, 2001 decision, it was unaware that it had affirmed the ALJ's decision by operation of law on March 7, 2001. This is evident not only from the BRB's April 4, 2001 order, vacating its March 16 decision, but also from its May 7, 2001 order, which denied Holmes' motion for reconsideration, believing that it was "without authority to review the administrative law judge's findings of fact and conclusions of law by way of a motion for reconsideration." Regardless of whether § 802.407 would permit the BRB to reconsider its own decision under these circumstances, it is clear from the facts of this case that the BRB's March 16, 2001 opinion was not a reconsideration of the March 7, 2001 final order.

Holmes attempts to dissuade this Court from finding his petition untimely by arguing that his April 9, 2001 motion for reconsideration tolled the time for filing a petition for review with this Court. He contends that under § 802.406, the time in which to file an appeal with this Court should run from May 7, 2001, the date the BRB denied his motion for reconsideration. To bolster his argument, Holmes relies on the Ninth Circuit's ruling in *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). In that decision, the Ninth Circuit held that a petitioner may file a motion for reconsideration of BRB decisions rendered under Public Law 106-554. *Id.* at 959 (holding that "[n]othing in Public Law 104-134[4] . . . purports to deprive parties of . . . [filing] motions for reconsideration").

In *Ramey*, however, the petitioners had filed *timely* motions for reconsideration. Here, Holmes' motion for reconsideration was filed on April 9, 2001, more than 30 days after the BRB's March 7, 2001 final order. Holmes' motion for reconsideration, therefore, was untimely and did not toll the running of the statute of limitation for filing his petition for review with this Court.

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[4] In *Ramey*, the Ninth Circuit interpreted a predecessor statute to Public Law 106-554.

III.

Because Holmes filed his petition for review more than 60 days after the BRB's March 7, 2001 decision, this Court lacks jurisdiction to decide the substantive merits of Holmes' petition. Accordingly, the petition is hereby

DISMISSED.

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601
BRB No. 00-0592
NOT PUBLISHED

ROBERT HOLMES,)
Claimant-Petitioner,)
)
v.)
)
VIRGINIA INTERNATIONAL)
TERMINALS)
Self-Insured)
Employer-Respondent)

DATE ISSUED: MAY 7 2001
[ENTERED: MAY 7, 2001]

ORDER

Claimant has filed a timely motion for reconsideration of the Board's April 4, 2001, Order. 33 U.S.C. § 921(b)(5); 20 C.F.R. § 802.407(a). In this Order, the Board vacated its March 16, 2001, Decision and Order due to the operation of Pub. L. No. 106-554, 114 Stat. 2763. This law provides that if the Board does not issue a decision within one year of the date the appeal was filed, the administrative law judge's decision is deemed affirmed on the one-year anniversary date of the appeal's having been filed for purposes of obtaining review of the administrative law judge's

decision in the United States Court of Appeals. *See* 33 U.S.C. § 921(c). Claimant's notice of appeal was filed on March 7, 2000. Therefore, as the Board's decision was not issued by March 6, 2001, due to a clerical error in the Office of the Clerk of the Board, the administrative law judge's decision was affirmed by operation of law on March 7, 2001.[1]

In his motion for reconsideration, claimant seeks equitable relief from the provisions of Pub. L. No. 106-554, based on the fact that the Board's failure to issue its decision in a timely manner was due to a clerical error. Claimant seeks to have the Board review the administrative law judge's decision by way of his motion for reconsideration, and, in essence, to "re-issue" its decision as a decision and order on reconsideration. Employer responds that the motion for reconsideration should be denied, as there are no exceptions to the law that the Board issue a decision within one year of the date the appeal was filed.

We deny claimant's motion for reconsideration. The Board does not have equitable powers, and moreover, Pub. L. No. 106-554 does not contain any provisions allowing an extension in the time in which the Board can review the administrative law judge's

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[1] Claimant's motion for reconsideration also is timely as to the March 7, 2001 affirmance of the administrative law judge's decision. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT) (9th Cir. 1998).

decision.[2] Inasmuch as the administrative law judge's decision was affirmed by operation of law on March 7, 2001, the Board is without authority to review the administrative law judge's findings of fact and conclusions of law by way of a motion for reconsideration.

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. § 802.409.

/s/Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

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2 The original legislation, Pub. L. No. 104-134, contained a provision allowing a motion to maintain the appeal on the docket for 60 days beyond the one-year anniversary date. Subsequent legislation has not contained this provision. *See Barker v. Bath Iron Works Corp.*, 30 BRBS 198 (1996) (order).

CERTIFICATE OF SERVICE

00-0592 Robert Holmes v. Virginia International Terminals, Inc. (Case No. 99-LHCA-1344) (OWCP No. 05-0103486)

I certify that the parties below were served this day.

MAY 7 2001
(DATE)

/s/Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.
Clerk of the Board

Gary R. West, Esq.
Patten, Wornom, Hatten
& Diamonstein, L.C.
12350 Jefferson Avenue
Suite 360
NEWPORT NEWS, VA 23602
- - Certified

Robert Holmes
2507 Orcutt Avenue
NEWPORT NEWS, VA 23607
- -Certified

R. John Barrett, Esq.
Vandeventer, Black, Meredith
& Martin, L.L.P.
101 West Main Street
Suite 500
NORFOLK, VA 23510
- -Certified

Ms. Carol A. DeDeo, Esq.
Associate Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite S-4325
WASHINGTON, DC 20210
- - Certified

Mr. B.E. Voultsides
District Director
OWCP-Longshore Division
200 Granby Mall
Room 212, Federal Building
NORFOLK, VA 23510

Judge Richard K. Malamphy
U.S. Department of Labor Office of
Administrative Law Judges
603 Pilot House Drive
Suite 300, Commerce Plaza
NEWPORT NEWS, VA 23606

U.S. Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd.
Suite 530
METAIRIE, LA 70005

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601
BRB No. 00-0592
NOT PUBLISHED

ROBERT HOLMES,)
Claimant-Petitioner,)
)
v.)
)
VIRGINIA INTERNATIONAL)
TERMINALS)
Self-Insured)
Employer-Respondent)

DATE ISSUED: APR 4 2001
[ENTERED: APRIL 4, 2001]

ORDER

The Board issued a Decision and Order in the captioned case on March 16, 2001. Pursuant to the terms of Pub. L. No. 106-554, 114 Stat. 2763, the Board's decision should have been issued on or before March 6, 2001, inasmuch as claimant's notice of appeal was filed with the Board on March 7, 2001,[1] Due to a clerical

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[1] Pub. L. No. 106-554, 114 Stat. 2763, states in relevant part that "any decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals."

error in the Office of the Clerk of the Board, the decision was not issued in a timely manner. Accordingly, we vacate the Board's March 16, 2001, Decision and Order. *See Burton v. Stevedoring Services of America*, 196 F.3d 1070, 33 BRBS 175 (CRT) (9th Cir. 1999); *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, 150 F.3d 288, 32 BRBS 132 (CRT) (3d Cir. 1998). The administrative law judge's Decision and Order Denying Benefits to the Claimant is deemed affirmed as of March 7, 2001.[2] *See* 33 U.S.C. § 921(c); 20 C.F.R. § 802.406.

/s/Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[2] Thus, any party aggrieved by the administrative law judge's decision may appeal the decision within 60 days of this date. 33 U.S.C. §921(c).

CERTIFICATE OF SERVICE

00-0592 Robert Holmes v. Virginia International Terminals, Inc. (Case No. 99-LHCA-1344) (OWCP No. 05-0103486)

I certify that the parties below were served this day.

APR 4 2001 (DATE)

/s/Thomas O. Shepherd, Jr. P.M.
Thomas O. Shepherd, Jr.
Clerk of the Board

Gary R. West, Esq.
Patten, Wornom, Hatten
& Diamonstein, L.C.
12350 Jefferson Avenue
Suite 360
NEWPORT NEWS, VA 23602
- - Certified

Robert Holmes
2507 Orcutt Avenue
NEWPORT NEWS, VA 23607
- -Certified

R. John Barrett, Esq.
Vandeventer, Black, Meredith
& Martin, L.L.P.
101 West Main Street
Suite 500
NORFOLK, VA 23510
- -Certified

Ms. Carol A. DeDeo, Esq.
Associate Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite S-4325
WASHINGTON, DC 20210
-- *Certified*

Mr. B.E. Voultsides
District Director
OWCP-Longshore Division
200 Granby Mall
Room 212, Federal Building
NORFOLK, VA 23510

Judge Richard K. Malamphy
U.S. Department of Labor Office of
Administrative Law Judges
603 Pilot House Drive
Suite 300, Commerce Plaza
NEWPORT NEWS, VA 23606

U.S. Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd.
Suite 530
METAIRIE, LA 70005

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601
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ROBERT HOLMES,)
Claimant-Petitioner,)
)
v.)
)
VIRGINIA INTERNATIONAL)
TERMINALS)
Self-Insured)
Employer-Respondent)

DATE ISSUED: MAR 16 2001
[ENTERED: MARCH 16, 2001]

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits to the Claimant of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits to the Claimant (99-LHC-1344) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a header, the leader of a gang of three workers, and filed a claim under the Act for compensation for a psychiatric injury allegedly resulting from work-related stress. Claimant, who commenced his employment with employer in 1978, stated that his work environment first became stressful in the 1990's, with the arrival of new managers and supervisors who found problems with his work performance. Claimant testified that his interactions with his immediate supervisor, pier foreman Bruce Sanders, were particularly stressful; specifically, claimant averred that Mr. Sanders opposed his promotion to header in 1996, refused claimant's gang desirable overtime assignments, sabotaged claimant's work, and falsely accused his gang of damaging freight. On several occasions, claimant

reported harassment by Mr. Sanders to Mr. Sanders's supervisor Greg Kubu, but no action was taken. Claimant's problems with management, and with Mr. Sanders in particular, culminated in the events occurring on Friday, February 6, 1998, and Monday, February 9, 1998. After having criticized claimant's work performance earlier that day, Mr. Sanders, on Friday afternoon, February 6, 1998, accused claimant of sleeping on duty, a company infraction that could result in termination. Claimant denied sleeping on duty, maintaining, rather, that he had been waiting in the terminal office for the checker to give him his loading instructions. A meeting between management, claimant, and Kevin Howard, claimant's union representative, was scheduled for Monday morning, February 9, 1998, for the purpose of affording claimant the opportunity to explain the alleged incident. After being informed of the accusation and the scheduled meeting, claimant suffered an anxiety attack, and therefore arranged to see Dr. Sutton, his family physician, the following Monday evening.[1] The meeting scheduled for Monday morning was cancelled by employer because employer elected not to take union representative Kevin Howard off the job he was working so that he could attend the meeting; the meeting was rescheduled for that evening, but was subsequently cancelled by employer. Claimant testified that he was concerned as to why employer kept stalling and did not want to meet with him. On the evening of February 9, 1998, claimant was

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[1] Claimant worked as a linehandler for employer on Saturday and Sunday, February 7 and 8, 1998, and for two hours on Monday evening, February 9.

examined by Dr. Sutton, who diagnosed depression and an anxiety disorder secondary to claimant's work situation, instructed claimant to stay off work, and referred claimant for mental health treatment.

Thereafter, claimant was treated by psychologist Dr. Holmes and psychiatrist Dr. Arboleda for an anxiety disorder and major depression with psychotic features. Dr. Holmes opined that work-related events and conditions contributed to claimant's illness, and that claimant was able to return to his regular work by November 16, 1998, on the condition that he was assigned to work with different supervisors. In an independent psychological evaluation conducted at employer's request, Dr. Taylor concurred in the diagnosis of major depression with significant anxiety caused, in part, by the work-related stress claimant subjectively experienced. Dr. Taylor concluded that claimant's psychological reaction to the workplace abuse he perceived would prevent claimant from working in that setting.

Although a meeting between management, claimant and the union representative eventually was convened on August 4, 1999, the issues surrounding the February 6, 1998, incident were not resolved; at that meeting, claimant was advised that he was being replaced as header, but his employment was not terminated. Claimant filed a claim for temporary total disability compensation from February 9, 1998 through

September 28, 1998, and for permanent partial disability compensation from September 29, 1998 to the present and continuing. [2]

In his Decision and Order, the administrative law judge, citing to *Marino v. Navy Exchange*, 20 BRBS 166 (1988), held that while claimant suffered a psychological injury, he did not demonstrate working conditions which could form the basis for a compensable claim. Accordingly, the administrative law judge denied claimant's claim for disability benefits. On appeal, claimant challenges the administrative law judge's determination that claimant's psychological injury is the result of a legitimate personnel action and that, therefore, claimant did not demonstrate the existence of working conditions sufficient to establish his *prima facie* case. Employer responds, urging affirmance.

It is well-settled that a psychological impairment which is work-related is compensable under the Act. *See, e.g., American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1967); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 134 (1998)(*en banc*)(Brown and McGranery, JJ., dissenting), *aff'g on recon. en banc* 32 BRBS 127 (1997)(McGranery, J., dissenting); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89 (CRT)(2d Cir. 1997). Furthermore, the Section 20(a), 33 U.S.C. §920(a), presumption is applicable in psychological injury

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[2] The parties stipulated that light duty work was available to claimant commencing September 28, 1998, on a 35 hour per week basis at an hourly rate of $18. *See* Decision and Order at 1.

cases. *Sewell*, 32 BRBS at 135. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Sewell*, 32 BRBS at 135. Claimant's psychological injury need only be due in part to work-related conditions to be compensable under the Act. *See Sewell*, 32 BRBS at 135; *Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 61 (1994).

Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Universal Maritime*, 126 F.3d at 262, 31 BRBS at 123 (CRT); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); *cert. denied, Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Universal Maritime*,

126 F.3d 256, 31 BRBS 119; *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge found the "harm" element of claimant's *prima facie* case satisfied as it is uncontested that claimant suffers a psychological injury. The administrative law judge next determined, however, that claimant's psychological injury resulted wholly from employer's legitimate personnel action, and that, accordingly, pursuant to *Marino,* 20 BRBS 166, claimant failed to satisfy the "working conditions" element of his *prima facie* case. In *Marino,* the Board first considered the issue of whether a psychological condition resulting from the termination of employment is compensable under the Act. The Board concluded that a legitimate personnel action, such as a reduction-in-force, is not a working condition that can form the basis for a compensable psychological injury. 20 BRBS at 168. Drawing a distinction between legitimate personnel actions and work-related cumulative stress, the Board in *Marino* remanded the case for the administrative law judge to address claimant's allegations that his injury was due as well to cumulative stress from supervising a number of locations, insufficient personnel to perform the job, working more than the required hours, and performing the duties of subordinates. *Id.* On remand, the administrative law judge awarded benefits on this theory, finding claimant's general working conditions were a cause of his injury. This decision was affirmed by the Board on appeal. *Marino v. Navy Exchange,* BRB No. 88-1720 (Dec. 12, 1990)(unpublished).

In subsequent cases involving allegation of the existence of stressful working conditions, irrespective of any legitimate personnel actions, the Board has held that claimant's minimal burden in establishing a *prima facie* case requires simply that he demonstrate the existence of working conditions which could have caused or aggravated his psychological injury. *See Sewell*, 32 BRBS at 136; *Konno*, 28 BRBS at 61. A demonstration by claimant of stress in his daily work environment, including day-to-day interactions with his supervisor, may satisfy the "working conditions" prong of claimant's *prima facie* case. *See Sewell*, 32 BRBS at 136. Claimant is not required to show unusually stressful conditions to order to establish his *prima facie* case. *See, e.g. Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Rather, even where the stress may seem relatively mild, the claimant may recover if an injury results. *See Sewell*, 32 BRBS at 137; *Konno*, 28 BRBS at 61. Moreover, in determining whether claimant's *prima facie* case is established, the relevant consideration involves claimant's own perceptions of the work events or interactions alleged to be stressful, and the effect such conditions had on claimant. *See Sewell*, 32 BRBS at 131; *Konno*, 28 BRBS at 61.[3] Thus, in a case in which claimant alleges the existence of a stressful relationship with a supervisor, the analysis must focus on the

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[3] We note, in this regard, that it is axiomatic that employers accept their employees with all the frailties that predispose them to injury. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

occurrence of events resulting in stress to the claimant, not whether the supervisor's actions were justified. *See Sewell*, 32 BRBS at 136, 137 n.5.[4]

We now consider claimant challenge on appeal to the administrative law judge's conclusion that claimant's psychological injury is wholly a result of a legitimate personnel action. At the outset, we note that the administrative law judge's conclusion is based on his findings, first, that employer's response to the accusation that claimant was sleeping on duty constitutes a legitimate personnel action and, further, that claimant's psychological injury resulted *solely* from that action, and not from work-related cumulative stress. Thus the initial question is whether the administrative law judge properly found that employer's response to the allegation that claimant was sleeping on duty was a legitimate personnel action. In making this determination, the administrative law judge reasoned that, as sleeping on duty was considered to be a serious company infraction which could result in termination, the accusation, whether it was true or not, merited both an investigation and a meeting. *See* Decision and Order at 8-9. Thus, the administrative law judge implicitly found that conducting an investigation and convening a meeting represented a legitimate personnel action by employer. However, the evidence as set forth by the

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[4] The Board stated in *Sewell* that a focus on whether a supervisor's actions were justified would require the supervisor to be at fault in order for the claim to be compensable, a requirement that would be inconsistent with the strict liability for work-related injuries on which workers' compensation rests. 32 BRBS at 137 n.5.

administrative law judge does not support the reasoning underpinning the administrative law judge's finding that employer's response was a legitimate personnel action. Specifically, in this regard, the administrative law judge took note of the uncontroverted hearing testimony that the purpose of holding a meeting was to allow claimant the opportunity to explain the alleged event. *See* Decision and Order 5; Tr. At 81-83; 127-128. Moreover, the administrative law judge acknowledged the uncontroverted testimony that the meetings scheduled for February 9, 1998, were cancelled by employer, a meeting was not convened until August 4, 1999, and, at that meeting, the issues surrounding the February 6, 1998 incident were not resolved. *See* Decision and Order at 5; Tr. at 29, 39-40, 56-57, 62-63, 82-83, 127-130. Inasmuch as the uncontroverted evidence establishes that the issues relating to the accusation that claimant was sleeping on duty were not resolved at the meeting that was eventually held 1 ½ years after the alleged infraction, neither the investigation nor the meeting, which the administrative law judge expressly found warranted by the accusation, accomplished their stated purpose.[5] The fact that the investigation and the meeting failed to resolve the issues surrounding the allegation that claimant was sleeping in the office

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[5] Although the administrative law judge noted that Mr. Howard investigated the alleged incident, *see* Decision and Order at 4, he did not discuss Mr. Howard's hearing testimony concerning this investigation. *See* Tr. At 55-56, 76-79. Furthermore, the administrative law judge did not discuss Mr. Sanders' testimony with respect to the reasons for his assumption that claimant was sleeping in the office. *See* Tr. At 99-100, 110-113, 119-120.

undermines the significance attributed to the investigation and the meeting by the administrative law judge.[6] As the rationale for the administrative law judge's conclusion that employer's response to the accusation constituted a legitimate personnel action is not supported by the administrative law judge's construction of the evidence, we must vacate that conclusion and remand the case for the administrative law judge to further consider this issue based on the record as a whole. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Marino*, 20 BRBS 166.

We consider next the administrative law judge's related findings that claimant's psychological injury resulted solely from the events related to his supervisor's allegation that he was sleeping on duty, and that no other working conditions existed which could have caused his psychological impairment. *See* Decision and Order at 9-10. Initially, the conclusion that claimant's condition resulted solely from these events in February 1998 is wholly unsupported by the medical evidence, *see* n.7, *infra*, and in any event, discussion of the cause of claimant's injury is an inquiry undertaken after Section 20(a) is invoked. In finding no other working conditions existed which could have caused claimant's injury, the administrative law judge determined that claimant presented little evidence to corroborate his testimony that management was conspiring to have him fired. This determination is not dispositive of whether working

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[6] We note, in this regard, that the administrative law judge declined to make a factual determination, on the basis of the record evidence, as to whether claimant actually did commit the infraction of which he was accused.

conditions existed which could have caused his injury, as claimant's complaints of a stressful working environment were not limited to a claim of a conspiracy on the part of management to have him fired. Rather, in hearing testimony acknowledge by the administrative law judge, claimant testified to a pattern of criticism and harassment in his treatment by Mr. Sanders, which he had reported to Mr. Kubu and Mr. Wade, the terminal manager. *See* Decision and Order at 2-4; Tr. at 12-19, 47-48.

The administrative law judge found claimant's testimony to be uncorroborated, and, thus, insufficient to establish that harassment by Mr. Sanders in fact occurred. In this regard, the administrative law judge noted that only Mr. Howard recalled that claimant complained of harassment by Mr. Sanders; the administrative law judge inferred from Mr. Howard's hearing testimony, however, that claimant complained of this harassment to Mr. Howard only after the alleged sleeping incident occurred. *See* Decision and Order at 9. The administrative law judge's inference regarding the timing of claimant's complaints, however, could not be reasonably drawn on the basis of Mr. Howard's testimony. Rather, Mr. Howard clearly testified that he was told a long time ago by claimant that claimant was being harassed by Mr. Sanders; Mr. Howard additionally testified that he had discussed claimant's complaints of harassment with both Mr. Sanders and Mr. Kubu. *See* Tr. at 66-68.

The administrative law judge further stated that the fact that claimant complained of harassment to his doctors does not establish that the work events that he

complained of actually occurred. *See* Decision and Order at 9-10. The administrative law judge, however, did not address the specific incidents of work-related stress and harassment that claimant reported to Drs. Taylor and Holmes.[7] Although the administrative law judge did not accept the psychologists' reports of these incidents as probative evidence that the incidents, in fact, occurred, he did acknowledge the opinion held by both Drs. Taylor and Holmes that claimant's perception of job-related stress and abuse was a cause of his psychological impairment and that claimant should refrain from working with those individuals with whom he had stressful interactions. *See* Decision and Order at 6; EX 4; EX 5; EX 8. It is noteworthy, in this regard, that neither physician attributed claimant's condition solely to the events surrounding the sleeping allegation. Moreover, there is no contrary medical opinion of record. *See* Sewell, 32 BRBS at 130.

Additionally, although the administrative law judge acknowledged claimant's complaints that his gang was falsely accused of damaging freight and did not receive desirable overtime assignments, *see* Decision and Order at 2, he did not make a

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[7] Dr. Taylor reported that claimant complained of exposure to bad language, threats of being fired, false accusation, mistrust of his union representative and co-workers, and an allegation by claimant that Mr. Sanders tried to kill him by assigning him to a worksite with 100° heat. *See* EX 4.1-4.2. Dr. Homes cited, as instances of claimant's stressful work environment, threats from the "top man," rumors that claimant had damaged freight, threats of physical harm, a supervisor's reference to black employees as "slaves," a boss's comment that claimant and his son were the "sorriest [SOBs] on the dock," and Mr. Sanders' accusation that claimant had urinated on the pier. *See* EX 5; EX 8 at 7, 10-13.

determination as to whether these events contributed to cumulative stress in claimant's general working environment which could have caused or aggravated claimant's psychological injury. *See Sewell*, 32 BRBS at 130; *Marino*, 20 BRBS at 168. Lastly, the administrative law judge discounted claimant's complaints of stressful working conditions which preceded the February 6, 1998 accusation that he was sleeping on duty on the basis that claimant did not seek psychological treatment or report symptoms of work-related stress to any physician until February 9, 1998. *See* Decision and Order at 10. The relevant case law, however, does no support the proposition that, in order to establish a *prima facie* case, claimant seek psychological treatment or manifest stress-related medical symptoms at the time that the stressful employment events occurred. Indeed, the compensability of a psychological injury caused or aggravated by work-related cumulative stress is premised on the occurrence over time of stressful work-related events, culminating in the manifestation of the symptomatology which represents the psychological injury. *See generally Sewell*, 32 BRBS at 129; *Konno*, 28 BRBS at 61; *Marino*, 20 BRBS at 168. *See also American Nat'l Red Cross*, 327 F.2d 559.

In light of the foregoing, we are unable to uphold the administrative law judge's determination that claimant failed to demonstrate the existence of working conditions which could have caused or aggravated claimant's psychological impairment. On remand, the administrative law judge must reconsider, based on the totality of the evidence and in accordance with the applicable legal principles, whether the cumulative stress of claimant's general working

conditions could have caused or aggravated his psychological injury. [8] *See Sewell*, 32 BRBS 134, *aff'g on recon. en banc* 32 BRBS 127; *Konno*, 28 BRBS 57; *Marino*, 20 BRBS 166.

We therefore vacate the administrative law judge finding that claimant did not satisfy the "working conditions" element of his *prima facie* case, and remand the case for reconsideration of whether the claimant is entitled to invocation of the Section 20(a) presumption in light of all the evidence of record. If, on remand, the administrative law judge finds the Section 20(a) presumption invoked, he must determine whether employer rebutted the presumption, and if so, whether a causal relationship is established based on the record as a whole. *See Universal Maritime*, 126 F.3d 256, 31 BRBS 119(CRT).

Accordingly, the administrative law judge's denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[8] As previously discussed, the relevant inquiry involves not merely the work-related events, but claimant's perceptions of those events and experience of stress resulting from them. *See Sewell*, 32 BRBS at 131; *Konno*, 28 BRBS at 61. Furthermore, focus on whether employer's actions were justified is not germane to this inquiry. *See Sewell*, 32 BRBS at 136, 138 n.5.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

CERTIFICATE OF SERVICE

00-0592 Robert Holmes v. Virginia International Terminals, Inc. (Case No. 99-LHCA-1344) (OWCP No. 05-0103486)

I certify that the parties below were served this day.

Mar 16 2001
(DATE)

/s/ Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.
Clerk of the Board

Gary R. West, Esq.
Patten, Wornom, Hatten
& Diamonstein, L.C.
12350 Jefferson Avenue
Suite 360
NEWPORT NEWS, VA 23602
- - Certified

Robert Holmes
2507 Orcutt Avenue
NEWPORT NEWS, VA 23607
- -Certified

R. John Barrett, Esq.
Vandeventer, Black, Meredith
& Martin, L.L.P.
101 West Main Street
Suite 500
NORFOLK, VA 23510
--Certified

Ms. Carol A. DeDeo, Esq.
Associate Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite S-4325
WASHINGTON, DC 20210
-- Certified

Mr. B.E. Voultsides
District Director
OWCP-Longshore Division
200 Granby Mall
Room 212, Federal Building
NORFOLK, VA 23510

Judge Richard K. Malamphy
U.S. Department of Labor Office of
Administrative Law Judges
603 Pilot House Drive
Suite 300, Commerce Plaza
NEWPORT NEWS, VA 23606

U.S. Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd.
Suite 530
METAIRIE, LA 70005

U.S. DEPARTMENT OF LABOR
Fax: (757) 873-3634

Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904
(757) 873-3099

Date: **February 3, 2000**

Case No.: **1999-LHC-1344**

OWCP No.: **5-103486**

In the Matter of:

ROBERT HOLMES,
Claimant,

v.

VIRGINIA INTERNATIONAL TERMINALS,
Employer.

[ENTERED: FEBRUARY 3, 2000]

DECISION AND ORDER DENYING BENEFITS TO THE CLAIMANT

This proceeding arises from a claim filed under the Longshore and Harbor Workers' Compensation Act ("Act"), as amended, 33 U.S.C. 901 et seq. On August, 23, 1999, a hearing was held in Newport News, Virginia. For the reasons stated below, the Court denies the Claimant's request that the Employer pay

for temporary total disability, permanent partial disability and medical expenses for alleged work induced stress.

STIPULATIONS

The Claimant and the Employer have stipulated to the following:

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

2. An employer/employee relationship existed at all relevant times.

3. The Claimant's average weekly wage was $1,067.61.

4. Light duty work was available commencing September 28, 1998 at 35 hours a week at $18.00 per hour.

5. The claim and the notice of the injury were both timely filed.

FINDINGS OF FACT

Work Events

The claimant, Robert Holmes ("Holmes"), has worked for the employer, Virginia International Terminals ("VIT"), since 1978. (Tr. 11). In Spring 1996, VIT promoted Holmes to the position of header. (Tr.

123). As header, Holmes was the leader of a gang, which consisted of himself and two other workers. (Tr. 12). A gang loads and unloads different types of materials. (Tr. 12). Holmes' gang worked with materials that included machinery, GE freight, cocoa beans, and bulldozers. (Tr. 12).

Holmes claimed that he began to experience difficulty at work in the 1990's. (Tr. 12). Holmes explained that he had problems with a supervisor, pier foreman Bruce Sanders. Holmes claimed that Mr. Sanders opposed Holmes promotion to header. (Tr. 17). Holmes further alleged that when he voiced these concerns regarding Mr. Sanders to Mr. Greg Kubu, Mr. Sanders' supervisor, that no action was taken. (Tr. 13).

Holmes also complained that his gang did not receive desirable overtime assignments. (See Tr. 14). Holmes testified that he was falsely accused of damaging some newsprint equipment. (Tr. 15, 44). If a gang damaged freight this would affect the amount of overtime that they would be given. (Tr. 16). Homes' gang was involved with some damage to cargo on September 6, 1996. (Tr. 130). Following standard procedure, VIT conducted an investigation of the incident and sent Holmes to a drug screen and analysis. (Tr. 131). Ultimately Holmes was not punished for this incident. (Tr. 131).

Holmes testified that in the Summer of 1996, Mr. Sanders accused him or not doing his job and of damaging freight. (Tr. 17-18, 44-45). Holmes further testified that Mr. Kubu also complained about his work performance. (Tr. 18.) According to Holmes, Mr.

Kubu told him that all the pier foremen and checkers were complaining about his work. (Tr. 18.) Holmes testified, however, that he never had any problems with any of the checkers. (Tr. 20). Holmes claimed that Mr. Kubu said that he would be watching Holmes with a magnifying glass and reviewing Holmes' work with a fine-toothed comb. (Tr. 18).

Mr. Kubu denied that management was conspiring to get Holmes fired. (See Tr. 84-85). Mr. Kubu also testified that management did not scheme to deny Holmes overtime. (Tr. 85). Although he could not cite any specific instances, Mr. Kubu did, however, feel that Holmes had a productivity problem and that such a problem would affect Holmes' overtime assignments. (See Tr. 91-92).

Mr. Sanders also stated that he holds no grudge against Holmes and has never threatened to fire Holmes. (Tr. 101, 113). Mr. Sanders denied having either the authority or desire to fire Holmes. (Tr. 101, 113). Mr. Sanders did state that he does have authority over which gangs get assigned overtime. (Tr. 102, 106). He denied, however, that he intentionally prevented Holmes' gang from receiving overtime. (Tr. 103, 107). Mr. Sanders cited the type of job and the skill of the gang as factors that he considered when deciding whether a particular gang should receive an overtime assignment. (Tr. 104).

James Wade is the manager for VIT's entire Newport News Marine Terminal and Mr. Kubu's immediate supervisor. (Tr. 122). Mr. Wade denied knowing anything about a managerial conspiracy to

fire Holmes. (Tr. 125). Mr. Wade does not have the authority to fire an employee, but he can remove a worker as a header. (Tr. 126) To fire an ILA union member, management would first have a meeting with that individual and his union representative. (Tr. 126). Mr. Wade would then report what occurred at the meeting to his boss Mr. Tarkenton. (Tr. 126). The two of them would then decide what action to take next. (Tr. 126). The type of action taken depends upon what wrongdoing the employee has committed. (Tr. 126).

In the seven years that Mr. Wade has been at the terminal, he has only terminated two workers. (Tr. 126). One of those individuals was fired because Mr. Wade caught him sleeping on the job. (Tr. 126). Even in that circumstance, Mr. Wade still met with the employee and his union representative before taking any action. (Tr. 126).

Holmes claimed that he felt his job has been threatened since 1995. (Tr. 50). Mr. Howard, president and representative of the union to which Holmes belongs, has worked in close proximity to Holmes. (Tr. 53). He testified that he has never seen anyone, including Mr. Kubu or Mr. Sanders, harass Holmes or treat him unfairly. (Tr. 53, 63). Mr. Howard testified that management was going to monitor Holmes' work performance, but he denied knowledge of any plan by management to fire Holmes. (Tr. 66-67). Holmes did tell Mr. Howard that Mr. Sanders was harassing him, but this allegation came out after Holmes was accused of sleeping on the job. (Tr. 67-68). Mr Howard

ultimately did speak to Mr. Sanders and Mr. Kubu about Holmes' allegation of harassment, but no resolution was reached. (Tr. 67).

Events of February 6-9, 1998

Mr. Sanders accused Holmes of sleeping on the job on Friday, February 6, 1998. (See Tr. 20-21, 31, 61). Mr. Howard, Holmes' union representative, investigated this allegation. (Tr. 59). He spoke to Holmes that Friday, at which time Holmes denied the accusation. (Tr. 61). On the day of the incident, Holmes said he was waiting in an office for the checker to complete the paperwork so that his gang could begin loading freight. (Tr. 25). Holmes also testified that he was not sleeping when Mr. Sanders came in and questioned him about the status of his current loading assignment. (Tr. 25).

Holmes stated that at that time, Mr. Sanders was upset about the lack of progress on the loading of the cars and instructed Holmes not to wait on the checker, but to go ahead and load the freight. (Tr. 26). Holmes testified that his gang had only been working on that particular assignment for a couple of hours before Mr. Sanders arrived. (Tr. 26).

On the date of the incident, Holmes' gang, gang 54, was assigned to pier B to unload pulp cars. (Tr. 96). Because the pulp cars had not yet arrived, gang 54 was reassigned to stack sacks of beans. (Tr. 96-98). While supervising the progress of the various gangs, Mr. Sanders noticed that gang 54 was not working. (Tr. 97). He assumed that gang 54 was taking a break, but

when he returned approximately ten minutes later gang 54 was still not working. (Tr. 97-98). Mr. Sanders confronted Holmes about gang 54's inactivity and instructed the gang on what work needed to be done. (Tr. 98).

Later that day gang 54 was reassigned to pier C for the purpose of loading aluminum ingots into rail cars. (Tr. 99). Mr. Sanders discovered Holmes asleep in an office when he went to investigate why only two people in gang 54 were loading the car. (See Tr. 99, 111). As required, Mr. Sanders reported the sleeping incident to his supervisor, Mr. Kubu. (Tr. 100).

Mr. Sanders also sent Mr. Wade, the terminal manager, a discrepancy report dated February 6, 1998. (Tr. 127). In the report, Mr. Sanders stated that he found Holmes sleeping on the job and that Holmes was having productivity problems earlier in the day. (Tr. 127). Mr. Wade scheduled to meet with Holmes, Mr. Howard, Mr. Kubu, and Mr. Sanders the Monday following the alleged incident. (Tr. 29, 127). The meeting was intended to allow Holmes the opportunity to explain the alleged incident. (Tr. 128).

The Saturday, Sunday and Monday following the Friday incident, Holmes worked as a linehandler. (Tr. 46). On the day of the incident Anthony Holmes, Holmes' uncle, was working as a member of his gang. (Tr. 47). Holmes' son was also a regular member of Holmes' gang. (Tr. 49).

The Monday meeting ultimately did not take place because Mr. Howard could not attend the meeting due to a prior work commitment. (Tr. 29, 56). The parties finally scheduled a meeting for Wednesday August 4, 1999. (Tr. 129). Holmes, Mrs. Holmes, Mr. Howard, Mr. Wade and Mr. Sanders were to attend the meeting. (Tr. 129). Mr. and Mrs. Holmes, however, left the meeting when Mr. Sanders arrived. (Tr. 129). Therefore Mr. Wade decided to have the meeting without Mr. Sanders, so that Holmes and his wife would attend the meeting. (Tr. 130).

The remaining parties had the meeting but never resolved the issue surrounding the February 6 incident. (Tr. 130). Holmes maintains that he was not sleeping in the office, but rather he was there waiting for the checker to complete his paperwork. (Tr. 139). After a year of having temporary headers for gang 54, Mr. Wade informed Holmes that he would be removed as header. (Tr. 132-133). Holmes, however, was not fired from VIT. (Tr. 133).

Medical Treatment History

Holmes has a history of diabetes mellitus and hypertension. (Tr. 43-44, Ex. 3.1). Holmes' treating physician, Dr. Thaddeus Sutton referred Holmes to Dr. Ola Ayodeji after he discovered Holmes had proteinuria. (Ex. 3.1). During the November 4, 1997 exam, Dr. Ayodeji observed that Holmes was "in no apparent distress at rest." (Ex. 3.2). Two weeks later at the November 18, 1998 follow-up visit, Dr. Ayodeji again noted that Holmes appeared to be "in no apparent distress at rest." (Ex. 3.3). And again at

Holmes' January 15, 1998 follow-up office visit, Dr. Ayodeji wrote that "the patient is in no apparent distress at rest." (Ex. 3.6).

On February 6, 1998, after Mr. Howard told Holmes that he had to attend a meeting Monday morning to discuss the work incident, Holmes suffered an anxiety attack. (Tr. 27-28). Holmes informed his wife of his attack, so she made an appointment with Dr. Sutton for Holmes for the following Monday evening. (TR 29). At this appointment, Dr. Sutton instructed Holmes not to return to work. (Tr. 31-32). Dr. Lewis Taylor, a clinical psychologist, also advised Holmes that he should not return to the waterfront or come into contact with certain individuals. (Tr. 35). Dr. Taylor also did not want Holmes to be around heavy machinery or the water. (Tr. 35).

On February 9, 1998, Dr. Sutton diagnosed Holmes with job-related stress and anxiety disorder. (Ex. 1.29). Dr. Sutton excused Holmes from work from February 9, 1998 through May 11, 1998. (Exs. 1.18, 1.21, 1.22, 1.32). In the Spring of 1998, Holmes was also seeing Dr. Leonard Holmes, a clinical psychologist, for psychotherapy. (Ex. 4.4) In letters dated February 26, 1998 and March 2, 1998, Dr. Holmes wrote that Holmes should continue his leave of absence from work until his physical problems are resolved. (Exs. 5.6, 5.7).

In an independent psychological evaluation conducted in May and June, 1998, Dr. Taylor concluded:

> Whether or not the workplace abuse which Mr. Holmes alleges is real, his psychological reaction to his perception of it is real and would probably prevent his effectively working in that setting. Without psychological and psychiatric treatment, it would be difficult for him, in his current state, to work in any setting. However, with advice from the mental health professionals who are treating, a return to an alternative work situation may be helpful in leading to a restoration of self-confidence and sufficient trust in others to be productive again in gainful employment.

(Ex. 4.6).

On June 15, 1998, Dr. Holmes released Holmes to do light duty work. (Ex. 5.25). On February 4, 1999, Dr. Holmes stated that Holmes could return to work as long as he did not have "the same supervisor who he had in the past." (Ex. 5.52). Dr. Holmes also advised that Holmes should "return to meaningful employment in a position similar to that which he had previously," but he should not yet return to working with individuals with whom he still had issues. (Ex. 5.52).

At present, Holmes is still receiving treatment from a psychologist, a psychiatrist, and his family doctor. (Tr. 41). He is currently taking the medication Effexor for his depression and anxiety. (Tr. 41-42). He

is also taking the medications Accupril and Norvasc for his high blood pressure and Glucophage and Accupril for his elevated blood sugar level. (Tr. 42).

Employment activities

VIT contracts with Outsource Resource, Inc. to clean Offsite warehouses. (Ex. 9.1). On September 17, 1998, Outsource Resource offered Holmes a job within his medical restrictions that would begin on September 28, 1998. (Tr. 36, Ex. 9.1). Holmes would work from 6:00 PM to 1:30 AM and be paid at a rate of $18.00 per hour. (Ex. 9.1) Holmes worked for Outsource Resource from the beginning of October 1998 through July 30, 1999. (Ex. 10.3, 10.4). Dr. Holmes, however, eventually advised Holmes that he could not commute so far to work because the medication Holmes had to take made driving such a long distance unsafe. (Tr. 33, 36-37). Thus, Holmes had to stop going to work everyday. (Tr. 37).

DISCUSSION

Holmes is seeking temporary total disability from February 9, 1998 through September 28, 1998. Holmes is also asking for permanent partial disability from September 29, 1998, to the present and continuing.

A work-related psychological impairment is compensable under the Act. See Director, OWCP v. Potomac Electric Power Co, 10 BRBS 1048 (D.C. Cir. 1979); Turner v. the Chesapeake & Potomac Telephone Co., 16 BRBS 255, 257 (1984). To receive the section 20

(a) presumption that a claim comes within the provision of the Act, however, the claimant must establish a prima facie case by proving that 1) he suffered some harm or pain, in this case a psychological impairment and 2) a work-related accident occurred or working conditions existed which could have caused the impairment. Adams v. General Dynamics Corp., 17 BRBS 258, 260 (1985); Kelaita v. Triple A Machine Shop, 13 BRBS 326, 332 (1981). Once these two elements are established, a claimant is entitled, under section 20 (a), to a presumption that the injury arose out of employment. See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP, U.S. Dep't of Labor, 455 U.S. 608, 102 S. Ct. 1312 (1982). This statutory presumption may be rebutted, however, if the employer presents substantial evidence disproving the work-relatedness of the injury. See Hughes v. Bethlehem Steel Corp., 17 BRBS 153, 155 (1985).

In the instant case, there is no doubt that Holmes did, in fact, suffer a psychological injury. Three different physicians, Dr. Sutton, Dr. Holmes and Dr. Taylor, diagnosed him with some form of stress-related anxiety and depression. Rather, the issue here is whether Holmes has fulfilled the second pare of the prima facie case by proving that work conditions existed which could have caused the psychological impairment.

The Benefits Review Board ("BRB") has held that a "psychological injury resulting from a legitimate personnel action . . . is not compensable under the Act. Such an event is not a working condition which can form the basis for a compensable injury." Marino v.

Navy Exchange, 20 BRBS 166, 168 (1988). In Marino, the legitimate personnel action was a termination of employment due to a reduction-in-force. See id. The Board concluded that if claimant's psychological condition arose wholly from his termination, the condition is not compensable. See id.

Thus, the question is two-fold. First, is the action taken by VIT a legitimate personnel action. And second, if VIT did take legitimate personnel action against Holmes, was that action wholly responsible for Holmes' psychological impairment or did other work conditions exist that could have caused his disability.

Mr. Sanders allegedly caught Holmes sleeping while on duty. Mr. Sanders reported this violation to his supervisor Mr. Kubu, who in turn reported it to the terminal manager, Mr. Wade. Following company policy, Mr. Wade arranged a meeting with Holmes, Mr. Sanders and Mr. Howard to discuss the alleged incident. This meeting scheduled for Monday February 9, 1998, was cancelled. This date also marked the first day that Holmes was unable to work due to illness.

In the past, VIT has fired at least one employee for sleeping at work. Thus, regardless of whether Holmes was sleeping on duty, the accusation alone is sufficiently serious enough that it would merit both an investigation and a meeting. In light of these facts, and Holmes' absence of countervailing evidence, the Court FINDS that VIT's response to the accusation was a legitimate personnel action.

Because VIT's action was a legitimate personnel action, in order to be entitled to disability Holmes must prove that work conditions existed which could have caused his psychological impairment. In order to prove his prima facie case, the claimant is not required to show unusually stressful conditions. The claimant can recover where the stress is relatively mild as long as an injury results. See Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base, 32 BRBS 127, 129 (1997). In either situation, however, the claimant must prove that the alleged events did, in fact, exist. Holmes has testified that he believed VIT management was conspiring to get him fired. (Tr. 13, 17-18.) Only two events demonstrate Holmes' difficulty with management: the time Holmes was written up for damaging cargo and the time on February 6 where Sanders first accused Holmes' gang of not doing their assigned work and later accused Holmes of sleeping on duty.

Other than Holmes own testimony, he has presented very little evidence to support his belief that management conspired to get him fired. He presented no witnesses to support his allegation that Sanders called him names and harassed him. Only Mr. Howard, Holmes' union representative, recalled Holmes complaining about Mr. Sanders harassing him. However, from Mr. Howard's testimony, Holmes appeared to complain to him only after the alleged sleeping incident. Further, as Holmes often works with his uncle and his son, one would think they would testify on behalf of their relative if, in fact, such abuse was taking place. As it is, Holmes has presented no

corroborating testimony that the events that he claimed were the source of his work-related stress even occurred.

Likewise, Holmes' complaints to his doctors do not establish that the work events that he complained of did actually occur. Further, although Holmes' doctors concluded that his illness was due to work-related stress, the temporal relationship between Holmes' illness and the events of February 6 and 9, 1998 indicate that it was the legitimate personnel action that resulted in Holmes' disability.

As previously noted, even though Holmes claims he had experienced problems with VIT management throughout the 1990's, only after the events of February 9, 1998, which have already been established as a legitimate personnel action, did Holmes seek any kind of psychological treatment. Further, on three separate occasions, the last time just one month before the action at issue, Dr. Ayodeji observed that Holmes was "in no apparent distress at rest." (Exs. 3.2, 3.3, 3.6). Had stressful work conditions during the 1990's and not just the legitimate action on February 9, 1998 been responsible for Holmes' psychological impairment, one would expect that at these check-ups that occurred just prior to Holmes' injury that his physician would have observed that Holmes was experiencing some form of stress. However, Holmes reported no symptoms of work-related stress or depression until after February 9, 1998.

The temporal relationship between Holmes' psychological injury that occurred in February, 1998 and the legitimate personnel action that took place on February 9, 1998 can not be ignored. This fact and a lack of evidence to support any other conclusion, support a finding that Holmes' injury was wholly a result of a legitimate personnel action, and not due to other work conditions. Thus, because Holmes' psychological impairment is wholly due to a legitimate personnel action, he is precluded from receiving disability benefits.

ORDER

Holmes' request for temporary total disability, permanent partial disability and medical expenses for alleged work induced stress is DENIED.

/s/ Richard K. Malamphy
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kal
Newport News, Virginia

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 01-1761
00-592

ROBERT HOLMES,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS,
Respondents.

[FILED: DECEMBER 9, 2003]
[ENTERED: DECEMBER 9, 2003]

ON PETITION FOR REHEARING AND REHEARING *EN BANC*

The Petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Niemeyer, Judge Motz, and Judge Gregory.

For the Court

/s/Patricia S. Connor
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1761

ROBERT HOLMES,
Petitioner,

v.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
and VIRGINIA INTERNATIONAL TERMINALS,
Respondents.

[FILED: JUNE 26, 2003]

PETITION FOR PANEL REHEARING
AND PETITION FOR REHEARING *EN BANC*

Petitioner-Employee, Robert Holmes, by counsel, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and the Local Rules of this Court, respectfully submits this Petition for Panel Rehearing and Petition for Rehearing *En Banc*. The Employee is appealing the unpublished *per curiam* panel opinion decided on June 12, 2003.

RULES 35(B)(1) AND 40(B)
STATEMENT OF PURPOSE

Pursuant to Federal Rule of Appellate Procedure 35(b)(1) and Fourth Circuit Local Rule 40(b), Petitioners' counsel represents that the following situations exist:

1. A material fact has been overlooked in the panel decision. Despite the panel acknowledging expressly at hearing that nothing was waived in Petitioners' brief, and all three of Petitioners' briefs avering that the Motion for Reconsideration was filed on April 6, 2001, the panel considered only that the Motion was filed on April 9, 2001, as argued alternatively at hearing by Petitioner.

2. Material laws were overlooked in the panel decision:

   A. The panel did not consider law related to the filing on April 6, 2001: 20 C.F.R. 802.206 (equating filing with service); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998) and *New Valley Corp. v. Gilliam*, 192 F.3d 150, 154 (D.C. Cir. 1999) (liberal mandates and presumptions flowing from the "beneficent purpose and humanitarian nature" of the Longshore and Harbor Workers' Compensation Act ("Act")); and *New York State Energy Research and Dev. Auth. v. Fed. Regulatory Comm.*, 746 F.2d 64, 67 (D.C. Cir. 1984) (the

equitable "substantial good-faith compliance" doctrine).

B. The panel did not consider law related to the filing on April 9, 2001, cited on brief by Respondents: *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 278 (1986), *Bowman v. Loperena*, 311 U.S. 262, 266 (1940), *Betty B. Coal v. Director, OWPC*, 194 F.3d 491, 496 (4th Cir. 1999); and *Director, OWPC v. Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990), all of which support the subsequent written decision and order of vacation by the BRB altering the deadline for filing the Motion for Reconsideration and this appeal.

3. The panel opinion is in conflict with decisions of the United States Supreme Court, this Court and another Court of Appeals, and the conflict is not addressed in the panel opinion. *See*, 1(A&B), *supra*.

4. The proceeding involves one or more questions of exceptional importance.

A. The case presents a question of first impression whether service by UPS Next Day Air complies sufficiently with the liberal service by mail provision of 20 C.F.R. 802.206 in light of "beneficent purposes and humanitarian nature" of the Act, the equitable "substantial good-faith" compliance doctrine, public policy and no prejudice.

B. The case presents a question of first impression whether a written decision on the merits and order of vacation by the Benefits Review Board ("BRB"), after its affirmance by operation of law by oversight, alters a party's deadlines for filing a motion for consideration and appeal.

ARGUMENT

Whether filed on April 6, 2001, or on April 9, 2001, the Motion for Reconsideration was timely.

I. April 6, 2001:

This Court decided the case as if Holmes' Motion for Reconsideration was filed on April 9, 2001, instead of on April 6, 2001. That decision was predicated solely on oral argument. Opinion at 4n.2.

However, at oral argument, this Court specifically rejected the assertion of Respondents that Holmes supposedly had waived all argument on brief, and expressly stated that it was taking nothing in Holmes' brief as waived. On brief, Holmes thrice asserted consistently that his Motion for Reconsideration was filed on April 6, 2001. Brief of Petitioner at 4n.2; Supplemental Brief of Petitioner at 6; and Reply Brief of Petitioner at 3-4.

By its Order on October 29, 2002, this Court engendered some confusion over the date of filing of Holmes' Motion for Reconsideration. In raising a question of jurisdiction (based on timeliness of filing) *sua sponte*, this Court framed the issue: "whether Holmes' motion for reconsideration filed April 9, 2001, was effective to toll the time for filing a Petition for Review of the denial of benefits?". On brief, Holmes continued to maintain that his Motion for Reconsideration was filed on April 6, 2001; while at hearing Holmes argued alternatively based on filing on April 9, 2001, as framed by the Court.

Consistent with all of his briefing, Holmes reaveres that filing was as of April 6, 2001. Under the Regulations applicable to a Motion for Reconsideration, the time of filing is deemed to be the time of service if "the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights." 20 C.F.R. 802.206. Such liberal time computation is consonant with the "beneficent purposes and humanitarian nature" of the Longshore and Harbor Workers' Compensation Act ("Act"), whereby this Court has a "mandate to construe broadly its provisions so as to favor claimants in the resolution of benefits cases," *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998); and presumptively is to "resolve doubtful questions...in favor of the claimants." *New Valley Corp. v. Gilliam*, 192 F.3d 150, 154 (D.C. Cir. 1999).

Holmes' Motion for Reconsideration was sent under cover letter to the BRB on Friday, April 6, 2001, by UPS Next Day Air. The Motion and letter were

mailed on Friday, April 6, 2001, to all parties in interest (as shown on the letter as copied), including opposing counsel. 4/6/01 Letter and Motion for Reconsideration, Certified Case Record at 6-7; 6/26/03 Affidavit of Gary R. West (attached); and UPS delivery jacket, "loose" in Certified Court Record.[9] Per their date-stamps, Holmes' Motion for Reconsideration and transmittal letter were received by the BRB on the next business day, Monday, April 9, 2001.

This case presents a question of first impression whether service by UPS Next Day Air qualifies under the liberal filing by service rule of 20 C.F.R. 802.206. While UPS Next Day Air is not identical to mail as a strict technicality, the aforesaid "beneficent purposes and humanitarian nature" of the Act mandate that this Court "construe broadly" the service provisions of §802.221 so as to "favor" Claimant, presumptively resolving the question of similar service methods in his favor (even if "doubtful"). Significantly, the BRB held accordingly, finding that Holmes' "motion for reconsideration also is timely as to the March 7, 2001 affirmance of the administrative law judge's decision". 5/7/01 BRB Order at 1n.1, Certified Court Record at 1-4. Obviously the BRB deemed the Motion for Reconsideration filed as of the time of service by UPS Next Day Air on April 6, 2001.

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[9] The Affidavit and jacket are before this Court on Petitioner's Rule 10(E) Motion to Supplement the Record filed contemporaneously herewith.

Moreover, on the particular facts of this case, there is absolutely no prejudice in equating service by UPS Next Day Air with mailing. Mailing the Motion for Reconsideration on Friday, April 6, 2001, could not possibly have resulted in actual delivery to the BRB any sooner than its next business day, Monday, April 9, 2001 (and possibly could have resulted later delivery). It is undisputed that the Motion for Reconsideration actually was delivered by UPS Next Day Air on Monday, April 9, 2001, *i.e.*, the earliest day possible by mail.

Certainly in the context of the "beneficent" and "humanitarian" Act, public policy is served by recognizing "substantial good-faith compliance" where there is absolutely no attendant prejudice. In other cases, "technical noncompliance with ...deadlines was excused in part because there had been substantial good-faith compliance." *New York State Energy Research and Dev. Auth. v. Fed. Energy Regulatory Comm'n*, 746 F.2d 64, 67 (D.C. Cir. 1984). To hold otherwise is to elevate form over substance.

Because a timely Motion for Reconsideration was filed by Holmes within 30 days of April 4, 2001, the 60-day time within which to file an appeal with this Court instead ran from May 7, 2001, when the BRB denied the Motion. *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). Accordingly, this appeal was timely filed on June 9, 2001.

II. **April 9, 2001:**

The case also presents a question of first impression whether the order of vacation by the BRB, after its affirmance by operation of law by oversight, alters a party's deadlines for filing a Motion for Reconsideration and appeal. Holmes reurges that the BRB's written decision on the merits on March 16, 2001, was a *de facto* reconsideration of its affirmance of the ALJ's decision by operation of law on March 7, 2001. Based on initial hearing, this Court was unpersuaded simply because: "At the time the BRB issued its March 16, 2001 decision, it was unaware that it had affirmed the ALJ's decision by operation of law on March 7, 2001." Opinion at 6n.3 (emphasis added).

The BRB being "unaware" of the prior affirmance by operation of law is exactly what renders it's the BRB's subsequent reversal on the merits a *de facto* "reconsideration" (despite not being denoted so expressly). That is to say, given that there already had been an initial BRB decision by operation of law, the BRB's subsequent decision to the contrary on the merits necessarily amounted to a "reconsideration" in fact of the earlier decision. The fact that the BRB's written decision on March 16, 2001, overlooked that the requisite one year for automatic affirmance had passed, simply does not change that after its decision by operation of law on March 7, 2001, the BRB reconsidered in fact what it already had decided and upon such *de facto* reconsideration decided it differently. It is irrelevant that the actual reconsideration was the product of some oversight; the

only material (and dispositive) point is that there was, in fact, a further (new) reconsideration on the merits and a decision thereon. [10]

Four decisions of the United States Supreme Court and the Fourth Circuit Court of Appeals cited by the VIT in its Supplemental Brief support that the BRB reconsidering and deciding the matter on the merits – even if by oversight – reset the clock for purposes of moving for reconsideration and appellate review. *ICC v. Brotherhood of Locomotive Egn'rs*, 482 U.S. 270, 278 (1986); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Betty B. Coal v. Director, OWCP*, 194 F.3d 491, 496 (4th Cir. 1999); and *Director, OWCP v. Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990). The Supreme Court in *Locomotive Egn'rs* pronounced, "When the Commission reopens a proceeding for any reason and after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order...is reviewable on its merits." 482 U.S. at 278 (emphasis added). Similarly, the Supreme Court in *Bowman* previously mandated that despite "considering the merits ['late'],...time for appeal runs

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[10] Holmes respectfully submits that this Court places undue emphasis on the BRB's decision by operation of law being a "*final* order." Opinion at 5-6 (emphasis on original). The word "final" in this context does not mean "unalterable." It merely means that affirmances by operation of law, like affirmances and reversals by written decision on the merits, are "final" orders for purposes of appeal. Just as there is no real dispute that "final" orders by written decision nonetheless are subject to "reconsideration," there can be no genuine dispute that "final" orders by operation of law likewise are subject to "reconsideration," within 30 days. Thus, it is irrelevant in the context of "reconsideration" that an affirmance by operation of law is a "final "order for purposes of appeal

from the date thereof." 311 U.S. at 266. Likewise, the Fourth Circuit in *Hileman* found that the period for filing a petition for review dates from the last board decision. 897 F.2d at 1279. Recently, *Betty B. Coal*, this Court explained that the "bright line" is "the agency's 'formal disposition' controls." 194 F.3d at 496.

In the case at bar, even though arguably "late" as in *Bowman*, the BRB did in fact reopen this case after its affirmance by operation of law, reconsidered it and issued a new decision on the merits within *Locomotive Egn'rs*, the "reason" for the same being irrelevant. That "'formal disposition' controls" under *Betty B. Coal*. Under *Hileman*, the period for filing a petition for review dates from the last board decision, which was its subsequent Order of vacation on April 4, 2001. However, because a timely Motion for Reconsideration was filed by Holmes within 30 days of April 4, 2001, the 60-day time within which to file an appeal with this Court instead ran from May 7, 2001, when the BRB denied that Motion. *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). Accordingly, this appeal was timely filed on June 9, 2001.

CONCLUSION

This Court should rehear this case, by panel and *en banc*, and the 5/7/01 Order of vacation of the Benefits Review Board should be reversed.

Respectfully submitted,
ROBERT HOLMES
By: /s/ Avery T. Waterman, Jr.
Avery T. Waterman, Jr.
Of Counsel

Avery T. Waterman, Jr., Esq.
Jennifer West Vincent, Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue
Suite 360
Newport News, VA 23602
(757)223-4555
(757)249-3242 Fax

Dated: June 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Petition for Panel Rehearing and Petition for Rehearing *En Banc* was mailed first class, postage prepaid, on this 26th day of June, 2003, to :

Richard J. Barrett, Esq.
Vandeventer Black, LLP
500 World Trade Center
Norfolk, VA 23510
Counsel for Virginia International Terminals

Samuel J. Oshinsky, Esq.
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue NW
Washington, D.C. 20210
Counsel for U.S. Department of Labor

/s/ Avery T. Waterman, Jr.
Avery T. Waterman, Jr.

United States Department of Labor
Benefits Review Board
00-0592

Robert Holmes,
Petitioner,

v.

Virginia International Terminals,
Respondent.

[FILED: APRIL 9, 2001]

Motion for Reconsideration

Now Into Court, through undersigned Counsel comes the Claimant/Petitioner, Robert Holmes who respectfully requests that this Board's Decision of April 4, 2001 *and* the "affirmed" ALJ decision arising from the application of Public Law 106-544, 114 Stat 2763 be reconsidered.

The Board issued a decision on March 16, 2001 which remanded this case back to the Office of Administrative Law Judges. On April 4, 2001, the Board *sua sponte* issued another decision citing public law 106-554, 114 Stat. 2763 indicating that its prior ruling had been delayed due to a "clerical error", and was therefore not timely filed.

The Claimant respectfully suggests that equitable relief should be invoked to relieve the Claimant of the drastic consequences of a filing error by the Clerk of the Board. The intention of the Board

was clearly stated in the Decision filed on March 16, 2001. It was also clearly the Board's intention for that decision to be "filed" in a manner consistent with public law 106-554. For this reason, the Board's decision of April 4, 2001 should be reconsidered.

Procedural Due Process requires that the Board follow its established rules regarding a Petition for Reconsideration. The Board's regulations and rules allow for a thirty (30) day period for the filing of a Motion for Reconsideration. The Claimant therefore request Reconsideration of the of the "affirmed" ALJ decision that arose as the result of the application of Public Law 106-544, 114 Stat 2763 on March 7, 2001. Claimant respectfully requests that this Motion for Reconsideration be considered as Claimant's request for a reconsideration of the ALJ's "affirmed" decision brought about by the "clerical error" of the Board. The Claimant respectfully requests that the Board reconsider the "affirmed" ALJ decision, apply the correct legal principles to that decision, and remand this case to the ALJ by its ruling on this Motion to Reconsider in a manner consistent with its prior substantive, but untimely decision.

Respectfully submitted,
/s/Gary R. West
Gary R. West

TRANSCRIPT OF
ROBERT V. HOLMES V. DIRECTOR, OWCP
VIRGINIA INTERNATIONAL TERMINALS,
NO. 01-1761
BEFORE THE FOURTH CIRCUIT OF APPEALS

[DATED: April 1, 2003]

Before: Judge Paul V. Niemeyer
Judge Diana G. Motz
Judge Roger L. Gregory

Appearances:

Avery T. Waterman, Esquire
Patten, Wornom, Hatten & Diamonstein
For the Petitioner

R. John Barrett, Esquire
Vandeventer Black, L.L.P.
For the Respondent

JUDGE NIEMEYER: Holmes versus the Director.

Mr. Waterman.

MR. WATERMAN: Thank you. I am Avery Waterman; I represent the Petitioner, Mr. Holmes. This morning we are appealing the April 4, 2001 vacation of the March 16th, 2001 merits decision of the BRB in our favor.

This case asks you to interpret and construe Public Law 104-134 in relation to CFR 802.406 and 407, and specifically to address the other Circuit opinions in Sun Ship and Burton, which we believe this Circuit should reject. It is our position that the March 16, 2001 merits decision should stand and is standing.

On June 8th, 2001 we filed the petition for review before this Court, which was timely, because it was within 60 days of our April 9, 2001 motion for reconsideration, which was timely.

JUDGE NIEMEYER: Let me ask you, what was your motion for consideration about?

MR. WATERMAN: Motion for reconsideration?

JUDGE NIEMEYER: Yes. In other words, motion for reconsideration usually asks the decision maker to reconsider for some reason, either a reason overlooked or a case or a fact or some improper reasoning or whatever; but you filed a motion for reconsideration against something that operated by question of law, and there was no decision. So what are you asking for?

MR. WATERMAN: Your Honor, we are asking that the Court --

JUDGE NIEMEYER: I guess my question -- and just to telegraph where I am going -- my question is why is a motion for reconsideration operative in this context?

MR. WATERMAN: What the BRB should have reconsidered was its vacation of its merit decision on March 16, 2001.

JUDGE NIEMEYER: I think that didn't have any effect. If we conclude that the case was decided by, as a matter of law, then the time runs from that date, doesn't it?

MR. WATERMAN: No, Your Honor. Our position --

JUDGE NIEMEYER: Our board entered an opinion in error, didn't it? It didn't have jurisdiction at that point, so --

MR. WATERMAN: Well, Your Honor, we take the position that the Court did have jurisdiction.

JUDGE NIEMEYER: Oh.

JUDGE MOTZ: What do we do with this statute?

MR. WATERMAN: That statute --

JUDGE MOTZ: Is it unconstitutional?

MR. WATERMAN: No, Your Honor, but it should not be construed --

JUDGE MOTZ: We just don't follow it?

MR. WATERMAN: No, you follow it, but you don't expand it beyond its letter and intent. That Public Law 104-134 was enacted simply toward clearing a backlog. As the *Ramie* decision has said, it was merely to give an opportunity to claimants who are in the netherworld to move ahead with review.

That decision also explained very cogently that Public Law 104-134 was not intended to divest anybody of anything, that is, it did not divest the parties of rights and, I think the other side of that coin is, it did not divest the Court from jurisdiction. And the way we know that is --

JUDGE NIEMEYER: If the ALJ denied benefits, then if the judgment was entered automatically by the statute and if you don't appeal it, you lose rights, don't you? Divest you of your rights?

MR. WATERMAN: Well, I would agree, had the BRB not taken upon itself to enter a merits determination thereafter; that's the key here, I mean, the bottom --

JUDGE NIEMEYER: Was it authorized to do that?

MR. WATERMAN: Yes, I believe so. Again, as *Ramie* indicates, just because Public Law 104-134 sets this one-year trigger, it doesn't mean that everything stops.

Specifically, the parties and the Court can reconsider after that time.

JUDGE MOTZ: When did you file your motion for reconsideration?

MR. WATERMAN: The Motion for Reconsideration was filed on April 9, 2001.

JUDGE MOTZ: Okay. In *Ramie*, even if *Ramie* is good law -- that's the case you're relying on, right?

MR. WATERMAN: That is one of the cases.

JUDGE MOTZ: Motion for Reconsideration was filed, as I read it, within the period of time after the automatic order was filed, right, and yours wasn't?

MR. WATERMAN: Correct, but the difference between our case law --

JUDGE MOTZ: So (unintelligible) on fact.

MR. WATERMAN: Yes, yes. Our case -- *Ramie* did not feature this special merits decision that we have, nor did it feature this vacation of the same. So we -- within five days of the BRB vacating its March 16th merits decision, we moved for reconsideration. So we are timely. We are timely. And I think the Court, under 802.407 --

JUDGE NIEMEYER: Well, maybe all we are reviewing, then, is the Board's decision to vacate its order.

MR. WATERMAN: I can agree with that.

JUDGE NIEMEYER: If we do that, then all -- we don't have the merits before us because the merits are precluded by time bound -- in other words, the Board entered an order after the drop dead date, right?

MR. WATERMAN: Correct.

JUDGE NIEMEYER: And you asked for reconsideration of the Board, the Board then vacated that?

MR. WATERMAN: Yes.

JUDGE NIEMEYER: And then you asked for reconsideration of that?

MR. WATERMAN: Yes.

JUDGE NIEMEYER: So all we have to decide on this appeal is whether the Board acted properly on those, on vacating.

MR. WATERMAN: Well, you could go that narrowly, because if you agree --

JUDGE NIEMEYER: That's all we could, can't we?

MR. WATERMAN: Yes, I agree.

JUDGE NIEMEYER: Because you didn't appeal the drop dead date, which is, which was an affirmance of what the ALJ did. That happened on March 7th.

MR. WATERMAN: Well, that's not good. In as much as we are appealing the vacation, what we are saying is that there should have been no vacation --

JUDGE NIEMEYER: Right.

Mr. Waterman -- that the March 16, 2001 merits determination should be in place.

JUDGE NIEMEYER: It should be and it's not, right.

MR. WATERMAN: And that is meritorious and wins the day for us.

JUDGE NIEMEYER: Well, forget the last part, because I am not sure yet. We're are not quite there yet. So the question you have to argue now is that the Board had authority to enter a merits decision on March 16th.

MR. WATERMAN: Absolutely. 802.407 --

JUDGE NIEMEYER: And the question is what gives you that authority? Where is that?

MR. WATERMAN: I would say that is CFR 802.407.

JUDGE NIEMEYER: Yeah. And what's the provision? What does it say?

MR. WATERMAN: And the provision is that not only can a party seek reconsideration, but that the Board itself *sui sponte* can reconsider without a party even asking. And I think what we had here, inasmuch --

JUDGE NIEMEYER: You're not quite at my point. I understand the reconsideration business. The question is whether the Board can decide the merits of the case after the year has passed. Do we have any law on that?

MR. WATERMAN: I don't mean to be contentious unduly, but I suggest --

JUDGE NIEMEYER: But you are suggesting that is a reconsideration. But it can't be. The question is whether it has the power to reconsider.

MR. WATERMAN: I think *Ramie* tells us that it does, because the *Ramie* decision says that 802.406 and 802.407 survive Public Law 104-134. That public law one-year window doesn't wash away the reconsideration and tolling provisions of the CFR. That is exactly what *Ramie* says. It says this is an opportunity --

JUDGE NIEMEYER: Well, I'm not talking about the tolling provisions. I am talking about where does the Board get the power to adjudicate the merits after a year has passed?

MR. WATERMAN: It never was divested.

JUDGE NIEMEYER: You don't think the public law divested it?

MR. WATERMAN: No. And I think -- again, going on the reasoning of *Ramie* -- that the public law merely provided an opportunity, and in the *Ramie's* words, did not divest. It says it didn't divest. It did not

specifically say that we are abrogating, overruling, washing away the CFR regs. It did not do so.

That we, you know, can reasonably construe things narrowly, and these rights of the parties to seek reconsideration exist, as does the Courts' rights *sui sponte*. And it says in 802.407, Section D, the Court, -- on its own motion that three members, three members, can vote in favor of a modification.

Well, that's what we have. That March 16, 2001 opinion was a unanimous three-member opinion. So, we have three members, within 30 days of the affirmants, if you will, by law, modifying, totally reversing the position, with, I will submit to the Court, very detailed, cogent reasons; you know, legal case support as well as factual observations.

JUDGE GREGORY: Counselor, you would say, then, that the March 16th decision was really a reconsideration?

MR. WATERMAN: I think that it is tantamount to that. It amounts to a de facto *sui sponte* reconsideration which was within the power of the Court to look at and modify.

JUDGE NIEMEYER: The Board could anytime, then, reverse the effect of the public law?

MR. WATERMAN: Well, I must say there is to me an open issue under Section D. If you look at the other sections, it clearly says that the parties must petition, must seek, move for reconsideration within 30 days.

Section D, which is about the Court, the BRB, acting on its own, is silent as to whether that 30 days would apply to things done *sui sponte* or not. So that is an open question, but it is irrelevant here because we did it within four days. Excuse me; the BRB made its determination within nine days of the --

JUDGE NIEMEYER: I guess my question still stands, though, is that you are taking the position that we would have to conclude that the Board could bypass the one-year provision simply by *sui sponte* granting reconsideration and then deciding the case after the one year.

MR. WATERMAN: Yes. What the temporal limits on that would be is an open question which the Court would not have to decide.

JUDGE NIEMEYER: It would be open. It seems to me if they can bypass it, then we are right back to the old regime.

MR. WATERMAN: Well, I think --

JUDGE NIEMEYER: Because what they can simply do is, they say we have issued an order, we are reconsidering, and they could come out with the merits or they could grant themselves a postponement, or whatever.

MR. WATERMAN: The temporal thing is significant because if the 30-day window that is clearly applicable to the parties were applicable to the Board itself, then that puts a sunset clause on it.

Your point, I understand, is if there is not that window, that sunset clause, then there is more open-ended authority by the Board. The problem here, though, was, as I understand the background law, not the Board waffling back and forth, but rather claimants getting left in the netherworld for years and years and years, where they just get no guidance and for lack of guidance are not enfranchised, had no legal right --

JUDGE NIEMEYER: Oh, I understand the motive for the statute. But now that the statute's passed, don't we have to look at the statute? And the statute is sort of -- there is a cut-off there. It says "no funds shall be expended."

MR. WATERMAN: The statute, as I think the language of *Ramie* appropriately says, provides the opportunity for litigants to get out of the netherworld and seek review, but it doesn't divest the --

JUDGE NIEMEYER: But it doesn't take it out (unintelligible) litigants, does it? You say it provides the litigants. I don't see where it says it. It says any such decision pending a review by the Benefits Review Board for more than a year shall be considered affirmed by the Board on the one-year anniversary.

MR. WATERMAN: I understand and --

JUDGE NIEMEYER: And be considered the final word of the Board. And so, it's not a discretion or an option for the parties to invoke, is it?

MR. WATERMAN: With -- I did not follow you.

JUDGE NIEMEYER: Well, in other words, you are sort of suggesting that since it was done for the benefit of a particular party, that the party could sort of -- that it shouldn't be -- it shouldn't work a negative effect on the party.

And I am suggesting to you that all you need to do is to have a case where the ALJ denied you benefits, and this one year passed and it's affirmed. It seems to me it is denying you benefits and Congress clearly has both a negative and a positive. It gives you an opportunity to go forward, and it also cuts you off if you don't go forward.

MR. WATERMAN: I understand that; and all I am saying is is, just like a party after an adverse decision by the ALJ has an opportunity to go forward, so does the BRB itself. That it is not some dichotomy that, in the event of the one year passing, parties can go forward within 30 days, but the BRB itself cannot under any circumstance or time constraint, go forward *sui sponte*.

JUDGE MOTZ: Well, why should that be -- if the BRB hasn't acted within a year, why couldn't we say that there has been a -- why couldn't the most reasonable interpretation of the statute be that there's been a congressional judgment that if the BRB does not act within a year, it has no more jurisdiction to act?

MR. WATERMAN: Well --

JUDGE MOTZ: You can appeal whatever comes out of the BRB, but it's had its year.

MR. WATERMAN: I understand your point, Your Honor, but the same CFR reg that provides the party the right for reconsideration is the same one that specifically provides the BRB the *sui sponte* right for reconsideration.

JUDGE NIEMEYER: Yeah, but what are we reconsidering?

MR. WATERMAN: The --

JUDGE NIEMEYER: We are extending -- the reconsideration amounts to nothing more than extending the congressional deadline, because there is nothing to reconsider unless we are second guessing Congress.

MR. WATERMAN: And I would say that if the BRB had not acted *sui sponte*, then the party would have been free to proceed ahead with an appeal, and if the party did that, then at some juncture the BRB would not be able --

JUDGE NIEMEYER: Well, I guess I'm raising the question, maybe, of whether the motion for reconsideration applies to this circumstance at all, 406.

MR. WATERMAN: Well, then you are -- I understand that, which would be you taking the *Ramie* decision head on head, and --

JUDGE NIEMEYER: Well, the *Ramie* decision is a decision, and we have to read it, but we have to make our own law, too, don't we, and interpret the statutes

the way we see them? And I am just asking the question.

MR. WATERMAN: Yes, sir.

JUDGE NIEMEYER: I understand where *Ramie* is.

MR. WATERMAN: That is one of your options.

JUDGE NIEMEYER: I am asking the question of whether -- how can a reconsideration operate consistently with a congressional cutoff?

MR. WATERMAN: Again, I think the congressional cutoff, as you put it, provokes, you know, brings things to a head to either get resolved or proceed to the next stage, and we don't think this Court should reject *Ramie*. The statute did not purport to specifically divest either the parties or the BRB their CFR rights.

JUDGE NIEMEYER: How does the *Ramie* opinion operate? It uses the word "toll." Did it mean postpone when it used the word toll? It says it tolls the period. Normally tolling means that during the period that a decision is made, it is just tolled, but the time began to run, and then it is tolled and then continues to run. Is that the way you understand it?

MR. WATERMAN: I think, as I understood the *Ramie*, and I may not be reading it correctly, I understood that to mean it changed, if you will, the trigger date, or the start date. You know, it kept the --

JUDGE NIEMEYER: The regulation postpones the start date itself. It says, "until the decision on reconsideration is made." That's when the new period for appeal runs. But the *Ramie* Court did use the word toll, didn't it?

MR. WATERMAN: It did say that, Your Honor, and I think all *Ramie* is saying is that it is looking at saying what date or event are we going to use to mark the beginning of the running of 60 days.

JUDGE NIEMEYER: Based on that reading of it, yeah.

MR. WATERMAN: I suspect I'm past the time --

JUDGE NIEMEYER: Yeah, I think you're over time. You saved some time on rebuttal; we hear some more from you.

MR. WATERMAN: Thank you.

JUDGE NIEMEYER: And Mr. Barrett?

MR. BARRETT: Thank you, Your Honor.
May it please the Court, I am John Barrett, representing Virginia National Terminals. I guess from Mr. Holmes' counsel's argument they are abandoning the majority of the argument in their brief --

JUDGE NIEMEYER: No, we're not --

MR. BARRETT: -- about the underlying --

JUDGE NIEMEYER -- leaving anything abandoned.

MR. BARRETT: Okay.

JUDGE NIEMEYER: He just chose to argue what he argued.

MR. BARRETT: All right. Well, I think the posture of the case is, in the light best to them, that we have an ALJ opinion that has been affirmed as a matter of law, and his real argument here is whether or not there is substantial law to uphold the ALJ, which I believe there is. As far as the --

JUDGE MOTZ: Well, we've talked all morning about timeliness.

MR. BARRETT: I'm going back to that.

JUDGE MOTZ: You just don't want to talk about that?

MR. BARRETT: I just want to get --

JUDGE MOTZ: Maybe you're conceding timeliness?

MR. BARRETT: No, I don't think that --

JUDGE MOTZ: You are conceding timely --

MR. BARRETT: No, not at all. Not at all. First of all, there is absolutely no case, no law at all, to support the position that the Board can go beyond the one year. That's been decided in numerous districts and jurisdictions.

JUDGE MOTZ: What about *Ramie*?

MR. BARRETT: *Ramie* I think is wrong. I read *Ramie* numerous times.

JUDGE MOTZ: *Ramie* is the (unintelligible) .

MR. BARRETT: No, *Ramie* is a reconsideration --

JUDGE MOTZ: (Unintelligible) wrong and saying there is no law, though? Those are two different concepts; we would agree, would you not?

MR. BARRETT: *Ramie* does not allow an opinion to be issued more than a year after the appeal has been filed. It just says you can reconsider. This is not a reconsideration. I would say that *Ramie* -- when you go and see what the Board in this case actually does when it gets the purported motion for reconsideration, they say we don't have any power to reconsider. So how can there be --

JUDGE NIEMEYER: Is there any -- do you think that this public law is jurisdictional?

MR. BARRETT: Yes, sir. I think that once the one year ran, and the Board does, too, the Board says in this -- in their May opinion, the Board is without authority to review the Administrative Law Judge findings of fact by way of a motion for reconsideration. So they are already saying it is futile, and we have no power to handle a motion for reconsideration.

So how can that be a substantive right if they can't do anything? The whole purpose of the public act was to speed things along. If you can file a

reconsideration where there is no power for the Board to do anything and that tolls the statute, then all you do is further delay things.

I think also in the appellant's argument they indicated that they filed their motion for reconsideration on April 9th. I think that's untimely, as a matter of law.

JUDGE NIEMEYER: Are there any other cases that have construed the public law one way or the other, the effect of the cutoff?

MR. BARRETT: As far as the --

JUDGE NIEMEYER: Whether it is jurisdictional or whether it is just portatory or whether it starts -- whether it accommodates reconsideration motions like *Ramie* suggested.

MR. BARRETT: Well, *Ramie* is the only one that's said anything about reconsideration. There was a whole bunch of cases when they first come out; you know, they were missing by one day or two days and the courts were all saying yeah, this is, I am sorry, the law is the law, you've missed, almost like a statute of limitations. Anything that happens one day after the statute it's a nullity, nothing happens.

JUDGE NIEMEYER: How about interpreting their motion for reconsideration as addressed to the Board's decision vacating its earlier order? The Board entered an order on the merits. Then it entered an order vacating, didn't it?

MR. BARRETT: Yes, but they had --

JUDGE NIEMEYER: On that, couldn't they appeal that and say the Board -- and bring the issue before us as to whether the Board properly acted?

MR. BARRETT: No, because the -- the purported opinion by the Board was a nullity. It was nothing. It absolutely had no power to issue that.

JUDGE NIEMEYER: Well, that's what they said, but maybe they are wrong on that.

MR. BARRETT: Well, if they are wrong on that, then every Court that's considered --

JUDGE NIEMEYER: Isn't that before us?

MR. BARRETT: Is whether or not the one year --

JUDGE NIEMEYER: No, no. Whether the Board was wrong in its decision, its -- what was its second decision? March 16th? No, what was --

MR. BARRETT: The March 16 --

JUDGE NIEMEYER: May 7th. Now, when did the Board vacate its --

MR. BARRETT: March 16th is when they did their order first.

JUDGE NIEMEYER: When did they vacate that?

JUDGE MOTZ: April 4th.

JUDGE NIEMEYER: April 4th. April 4, isn't that decision before us for review?

MR. BARRETT: Umm, I would say it is. But all it does is put things back to the status quo of what they, by law, they were required to do. Because once March 6 ran --

JUDGE NIEMEYER: What if we were to conclude that -- take *Ramie* a step further, and say the Board *sui sponte* could have reconsidered the order that was entered by operation of law.

MR. BARRETT: But they didn't. They didn't say that they did. They had a chance on remand, on the second reconsideration, to say well, this was our *sui sponte*. I mean, they just missed the deadline. They flat out missed the deadline. By operation of law, the ALJ opinion was affirmed.

Then, when they got the remand, the reconsideration, they said we can't do anything, the year has run, we don't have any jurisdiction.

JUDGE GREGORY: But counselor, in reading the public law, what do you take the word "considered" to mean? It says "shall be considered the final order." Now, we have to read the statute so that all words have meaning. It didn't say it "shall be" the final order. It says "considered." Couldn't this mean that this just allows you to go forward? That you now have an opinion that allows you to have the jurisdiction either

to appeal it to us? But it doesn't really strip power from the Board, does it? Is it --

MR. BARRETT: I think it absolutely does, and I think the Board said it does.

JUDGE GREGORY: But what does "considered" mean? What is that? Is that superfluous? Why didn't it just say "it shall be the final order"? It says "shall be considered the final order."

MR. BARRETT: I think it means -- because when these first -- during the first multitude of these, sometimes there wasn't even an order. You just got to the one year, the Board was still so backed up that there wasn't anything coming out, and you just put in evidence that it has been 366 days.

JUDGE GREGORY: In fact --

MR. BARRETT: That means they don't even have to issue an order for it to be a final order.

JUDGE NIEMEYER: It has to be considered a final order because there was no order.

MR. BARRETT: Right. Even if they didn't issue an order, it was considered an order. And that is why the appeal time runs and the time for reconsideration runs from the day after that one year.

JUDGE GREGORY: Well, you are saying "ordinarily." Let's say that they decide this case within six months.

After their opinion comes down, they lose all authority to change that opinion?

MR. BARRETT: Do you mean if they did it in a timely fashion?

JUDGE GREGORY: Sure.

MR. BARRETT: No.

JUDGE GREGORY: Why not? It is a final order.

MR. BARRETT: Because then you go to the regs that say they can reconsider.

JUDGE GREGORY: Well, then, why wouldn't this -- just because it could be considered a final order, why wouldn't those things, filed under regs, still exist to amending that order, even though it operated? It came about by operation of law under this public law? Why couldn't they come back and say wait a minute, we're going to reconsider it.

MR. BARRETT: Well, they said -- I mean, they said they did reconsider, and they had no power to reconsider. The Board doesn't --

JUDGE GREGORY: They first came out with a decision that was different than the one that was by operation of law, correct?

MR. BARRETT: That's just because they made a mistake. They just -- it is like they missed the statute of limitations.

JUDGE MOTZ: It doesn't really matter what the word "considered" means; it is interesting, I suppose. This is a legal question.

MR. BARRETT: I know.

JUDGE MOTZ: Repeatedly telling Judge Gregory that the Board says they don't have any jurisdiction really doesn't expand your case. You need to tell us why the reason is they don't have it.

MR. BARRETT: The statute after one year makes it a final order and divests them of them jurisdiction.

JUDGE MOTZ: Does it say somewhere that it divests them of jurisdiction?

MR. BARRETT: I don't know.

JUDGE GREGORY: The answer is no, it doesn't.

JUDGE MOTZ: Don't you think you would know if it said that? I'd bet you'd know that.

MR. BARRETT: I have probably jotted it down somewhere; I wasn't focusing on this as the main element that was before you.

JUDGE NIEMEYER: It looks to me like the Board is denied the ability to spend any money on the case, for any purpose. And that's the way it's said. I mean, in other words, for reconsideration or anything else. That may be jurisdictional. It says "no funds made available

by this act shall be used by the Secretary of Labor after this date on the case."

And so, the prohibition is that ends the Board's jurisdiction, period. That has to be your argument. I don't know whether that's right. I'd love to see how similar statutes have been construed. If it is jurisdictional, then it seems to me it raises the question of whether there is a motion for reconsideration.

But the more difficult problem is the motion for reconsideration, even if it is considered an order, would then undermine what Congress intended, because it would then give the Board discretion to change its mind and make a decision beyond that date.

MR. BARRETT: Yes, sir.

JUDGE MOTZ: Is there a limit in the regs on how long the Board can take to consider a motion for reconsideration?

MR. BARRETT: Not that I know of. I mean that, again, would, to the extent that --

JUDGE MOTZ: I mean that helps you because then it looks like they could take another year or two or three.

MR. BARRETT: Right. You could be right back -- if that were the law, you would be right back in exactly the same position that Congress wanted to avoid. If they can get up to the one year, even go past the one year, the one year and 30 days, I guess, or 29 days, then take a reconsideration motion, or --

JUDGE NIEMEYER: Or *sui sponte*.

MR. BARRETT: Or *sui sponte*. Take another two or three or four years, you are back doing the same thing that the Congress intended not to do, and that is why they passed the law saying you had one year, period. And anything -- one year and one day was affirmed, whether or not an order was actually issued. That is why it is considered a final order.

So, I don't believe the April 9th was a timely motion to reconsider because it was more than 30 days after March 6th, the March 7th operation of law, final order. I think the order they issued by mistake in March is a nullity. It has no --

JUDGE NIEMEYER: Your argument is that their motion for reconsideration takes it even out of *Ramie*?

MR. BARRETT: Yes. I think it was too late, first, and then second, I think *Ramie* -- this Court should reject *Ramie* in that if there is nothing that can be done in the reconsideration, why should that toll the statute? Why should there even be a reconsideration if it doesn't do anything or can't do anything?

JUDGE MOTZ: You know that you have two arguments, one is *Ramie* is wrong, and second, even if *Ramie* is right, they don't come within *Ramie*.

MR. BARRETT: Yes, sir.

JUDGE MOTZ: They weren't timely under *Ramie*.

MR. BARRETT: Yes, ma'am. I am sorry. Yes. That's my argument on the timeliness, which leaves us just with the underlying ALJ opinion, affirmed as a matter of law. We cite in the brief how Judge Molantry went in detail through the Moreno requirement.

We would ask the Court to affirm the underlying ALJ opinion if that comes before you, and adopt Moreno as the law of the Fourth Circuit, or the circuit that's tried it with approval in a case or two; that we would ask that first of all, you'll find that we're not here in a timely fashion --

JUDGE NIEMEYER: But that makes the distinction between working conditions and personnel decisions.

MR. BARRETT: Yes, and the judge went through that. I mean, first you find that we had a legitimate personnel and he said -- the other things he is talking about, I don't believe, and he said there is no cooperation, and the medical evidence is he wasn't having any problems until after this, so we believe that there is certainly substantial evidence in the record that the underlying opinion is valid and should be upheld. Thank you.

JUDGE NIEMEYER: Thank you, Mr. Barrett.

Mr. Waterman.

MR. WATERMAN: Public law does not say what defense counsel says. Public law doesn't say that there can be no opinion. It doesn't speak about divestiture. All it speaks about is budget. All it talks about is

money. It talks about the BRB not spending money. It's matters of appropriation, it's matter of finance, it is not a matter of jurisdiction. So they overspent their budget by thinking about this case. That doesn't mean they wholly lacked jurisdiction to do that. Congress didn't take away jurisdiction.

JUDGE NIEMEYER: What about the argument that your motion for reconsideration is more than 30 days after the date that we have to take as the final order?

MR. WATERMAN: Well, that begs the issue, is -- no. We say that the final order is the March 16, 2001 de facto *sui sponte* reconsideration.

JUDGE NIEMEYER: That they said right on there, in their own opinion, that this was not a motion for reconsideration. We were deciding the merits in the first instance, and we were late, and we didn't have authority to do so, so they didn't treat that as a reconsideration.

JUDGE MOTZ: They had no authority. *Ramie* is the (unintelligible).

MR. WATERMAN: I understand.

JUDGE MOTZ: On this particular --

MR. WATERMAN: I understand, Your Honor. A rose by any other name. It amounted to that. It amounted to a de facto modification of what was, what came down by operation of law. I understand your concerns, Your Honor, that theoretically we could have

situations of the BRB taking months or years, I guess, to come back and *sui sponte* change things.

JUDGE MOTZ: What about --

MR. WATERMAN: But I --

JUDGE MOTZ: What if the motion for reconsideration is pending with the BRB for a year? Then does it automatically become the ALJ thing once again? Automatically become affirmed? Does this Public Law take effect to that?

MR. WATERMAN: Honestly, Your Honor, I don't have an answer.

JUDGE NIEMEYER: Oh, that would be easy to cure. You'd do another motion for reconsideration.

JUDGE MOTZ: Right. It just seems to me that your argument has some difficulty. It has no limits.

MR. WATERMAN: Theoretically, it doesn't. But if you have -- again, I would suggest that if there was a problem or it got to be an issue with the BRB chronically or otherwise taking a very long time, that we would have what we don't before us today; you know, does the 30-day window that applies to parties apply to the BRB? I think the problem is more theoretical than real --

JUDGE NIEMEYER: Well, you have to go even a step further. You have to convert the BRB's determination on the merits as a motion, as a *sui sponte* motion for

reconsideration. The BRB is a pretty sophisticated body on its own rules, and it said it was not a motion for reconsideration. It was a determination on the merits that was late, and so it vacated it. And then, when you filed a motion for reconsideration, it denied that.

MR. WATERMAN: I understand, Your Honor.

JUDGE NIEMEYER: So, you want us to convert their late order on the merits into an order for reconsideration, and then construe the fact they have the power to reconsider.

MR. WATERMAN: I am saying that I think that that is de facto how their decision of March 16 operated, regardless of whether they called it their decision and order. In as much as there was already an order in place by law, they had in fact modified what was in place by law, whether --

JUDGE NIEMEYER: But they didn't know the order was in effect, so they weren't reconsidering it. They had overlooked that date.

MR. WATERMAN: Well, you know, then, and I guess that's not unlike arguably the Petitioner, in that we can't just close our eyes. I mean, they are charged with the same knowledge, aren't they, that the parties are? Isn't the BRB charged with knowing that by operation of law on March 7, 2001 they ostensibly affirmed such that them taking any action thereafter, was, had to be, and was, in fact, a modification? We can't close the eyes of the BRB when we don't do it for the parties.

I don't think it is a real problem as a practical matter that this is going to be the BRB making its decisions later. As a matter of public policy we want the BRB to decide things. We want them to process it, scrutinize it.

JUDGE NIEMEYER: Under your case, situation, what are we reviewing? We have an ALJ order that the Congress said is the final order that has been affirmed. We have an order of the Board that reverses the ALJ. Then we have an order of the Board that vacates this order reversing the ALJ.

MR. WATERMAN: Yes, sir.

JUDGE NIEMEYER: What do you want us to review?

MR. WATERMAN: I as a Petitioner want this Court to review the 4/4/01, the April 4, '01 vacation; and we say that that was improvident and erroneous as a matter of law. And so, if you peel that back, that leaves you with the March 16, 2001 decision and order, and we are happy for it to stop there.

Opposition wants you, if that's where you end up going, to March 16, 2001, although not exactly briefed that way, I expect opposition wants you then to scrutinize the March 16, 2001 order and decide was that provident, was that meritorious, vis-à-vis the underlying ALJ decision that it reversed.

JUDGE GREGORY: I am going to be a little strong, I guess. You told us they reversed themselves after your 30 days passed, but on April 4th you were on notice,

weren't you, that you should appeal? Even by operation -- the one that occurred by operation of law. I can see you rely -- you don't want to appeal or ask for a reconsideration --

MR. WATERMAN: It only --

JUDGE GREGORY: -- right after you thought you had won, but on April 4th you still had time to appeal within thirty days, right? You could have appealed.

MR. WATERMAN: Correct. If the Petitioner had adopted the employer's view of the law, if they had --

JUDGE MOTZ: Or adopted the Board's view of the law?

JUDGE GREGORY: Right.

JUDGE MOTZ: Which would be, I would think, good form.

MR. WATERMAN: Understood. Mathematically, you are correct. I mean, there clearly was some number of days left to come to this Court for review, you know, if we were to essentially pass on the March 16th, 2001 order. We do not think that that is what is required. Thank you very much.

JUDGE NIEMEYER: Thank you very much, Mr. Waterman. We will come down and brief counsel. Let's move on to the last case.

(The proceedings adjourned.)

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Catherine A. Stanley, CSR, CCR-VA, CSR-CA, do hereby certify that the foregoing transcript is a true and correct record of the proceedings conducted at the United States Court of Appeals, Fourth Circuit, as transcribed to the best of my abilities from a CD recording of the proceedings, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in this outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 2nd day of March, 2004.

My commission expires: March 31, 2007

/s/Catherine A. Stanley
NOTARY PUBLIC IN AND FOR
COMMONWEALTH OF VIRGINIA

Supreme Court, U.S.
FILED
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No. 03-1288

IN THE

Supreme Court of the United States

ROBERT HOLMES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

F. NASH BILISOLY
Counsel of Record
R. JOHN BARRETT
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510-1699
(757) 446-8600
Attorneys for Respondent Virginia International Terminals

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

COUNTER QUESTIONS PRESENTED

I. Whether a decision of the Benefits Review Board, issued subsequent to its adverse affirmance by operation of law, is effective to toll the time for filing a petition for review to the circuit court of appeals where there was no timely motion for reconsideration filed pursuant to 20 C.F.R. § 802.407?

II. Whether a petition for review to the circuit court of appeals, which was filed more than thirty (30) days late, was timely filed?

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STATEMENT

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a petition for a writ of certiorari "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. Rule 15. Pursuant to such obligation, Respondent, Virginia International Terminals ("VIT" or "Respondent") states as follows:

In his Statement of the Case, Petitioner, Robert Holmes ("Holmes" or "Petitioner"), alleged that both his Motion for Reconsideration to the Benefits Review Board ("BRB" or "Board") and his Petition for Review to the Fourth Circuit Court of Appeals were "timely." (Pet 4.) To the contrary, both the Motion and the Petition were in fact untimely.

Pursuant to 20 C.F.R. § 802.407, any party in interest may file a request for reconsideration of a Board decision within 30 days from the filing of that decision. By operation of law, the decision of the Administrative Law Judge ("ALJ") was deemed affirmed as of March 7, 2001. In order for Holmes' Motion for Reconsideration to be considered timely, it was required to be filed by April 6, 2001. Holmes did not file his Motion for Reconsideration until April 9, 2001. Accordingly his Motion for Reconsideration was not timely.

Pursuant to 3 U.S.C. § 921(c), Holmes was required to file his Petition for Review within 60 days of March 7, 2001, the date of affirmation by operation of law of the ALJ's decision, or by May 6, 2001. He did

not. His Petition for Review was filed on June 8, 2001. Therefore, it was not timely.

REASONS FOR DENYING THE WRIT

This court should leave undisturbed, by denying certiorari, the decision below of the Fourth Circuit Court of Appeals. This Court has stated that it will not grant a writ of certiorari except in cases where there is a true conflict of opinion and authority between the circuit courts of appeal, and in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 422 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955); *see also* Sup. Ct. Rule 10 (reasons to grant certiorari are limited to cases involving a conflict among the circuits, a conflict with the decisions of this Court, or an important question of law). As no applicable circumstances are present in the instant case, Petitioner's writ of certiorari should be denied.

I. THERE IS, IN FACT, NO CONFLICT BETWEEN THE FOURTH AND NINTH CIRCUITS ON THE ISSUE PRESENTED IN THIS CASE.

Petitioner argues that the Fourth Circuit's decision directly conflicts with the decision of the Ninth Circuit in *Ramey v. Stevedoring Servs. Of Amer.*, 134 F.3d 954 (9th Cir. 1998). This contention is incorrect.

A. THE DECISION BELOW BY THE FOURTH CIRCUIT IS UNPUBLISHED, AND THUS NOT A PRECEDENTIAL DECISION; THUS THERE IS NO VALID CIRCUIT SPLIT.

Both the Opinion of the Fourth Circuit entered June 12, 2003 and the Order of the Fourth Circuit entered on December 9, 2003 were unpublished decisions. As a result, these cases have little, if any precedential value, even within the Fourth Circuit. *See* 4th Cir. R. 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

Because there is no precedential impact of these unreported decisions, they can have no effect on the outcome of cases in any circuit, including the Fourth Circuit. An opinion that has no precedential value cannot create a conflict among the circuits. Accordingly, the Respondent respectfully requests that Petitioner's petition for writ of certiorari be denied.

B. THE DECISION BELOW BY THE FOURTH CIRCUIT IS FACTUALLY DISTINGUISHABLE FROM THE NINTH CIRCUIT'S OPINION IN *RAMEY*; THUS THERE IS NO VALID CIRCUIT SPLIT.

The present situation is factually inconsistent, and thus, distinguishable, from that in *Ramey*. This Court has held that a petition for a writ of certiorari

should be denied where the asserted conflict in decisions, purportedly resulting in a circuit split, arose from a "difference in states of fact, and not in application of a principle of law." *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813, 75 L. Ed. 728, 51 S. Ct. 214 (1931).

In *Ramey*, the Ninth Circuit held that a petitioner may file a motion for reconsideration of BRB decisions affirmed by operation of law pursuant to Public Law 106-554, and that such motion may toll the 60-day period for filing petitions for review of courts of appeal. *Ramey*, 134 F.3d at 958-959. However, the petitioners in that case had filed *timely* motions for reconsideration. The Fourth Circuit correctly found that Holmes' motion for reconsideration was untimely and could thus not operate to toll the running of the statute of limitations for filing his petition for review with the Fourth Circuit. The Fourth Circuit did not address the issue of whether a *timely* filed motion for reconsideration would toll the 60-day appeal period where the ALJ decision was affirmed by operation of law pursuant to Public Law 106-554. Rather, it applied significantly divergent facts to determine whether a timely petition for review had been filed.

Because there is merely a difference in the factual situations, not in the application of a principle of law, it cannot be concluded that there exists a valid circuit split worthy of review by this Court and the petition for writ of certiorari should be denied.

II. EVEN IF THE COURT WERE TO ADDRESS THE QUESTION PRESENTED AS STATED BY THE PETITIONER, THE OUTCOME OF THE CASE WOULD BE THE SAME, REGARDLESS OF HOW THE CONFLICT IS RESOLVED.

This case represents a poor vehicle for resolving any potential conflict with prior decisions of this Court or other circuits because the issue of whether an opinion on reconsideration by the Board after the automatic affirmation by operation of law of an ALJ decision can alter the limitation period for seeking circuit court review is moot in this case. Review by this Court of such question presented would not yield a different result than that reached by the Fourth Circuit because the Petitioner failed to meet the limitations period for filing a motion for reconsideration with the Board.

Even if this Court were to find that an opinion on reconsideration by the Board, filed subsequent to the affirmation by operation of law of an ALJ opinion, can toll the limitations period for filing a petition for review to the circuit court, as suggested by the Petitioner, this particular petition for review by the Fourth Circuit would still be dismissed prior to reaching the substantive merits of the claim. Petitioner's motion for reconsideration by the BRB was not filed within 30 days of the final decision by operation of law, as required by 20 C.F.R. § 802.407. Thus, in this case, there was no valid decision on reconsideration to toll the limitations period.

Accordingly, the petition for writ of certiorari should be denied because the outcome of the questions

presented would have no effect on the results rendered in this case.

CONCLUSION

For the foregoing reasons, Holmes' petition for writ of certiorari should be denied.

Respectfully submitted,

F. NASH BILISOLY
Counsel of Record
R. JOHN BARRETT
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510-1699
(757) 446-8600
Attorneys for Respondent Virginia International Terminals

(2)

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In the Supreme Court of the United States

ROBERT HOLMES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor of Labor

MICHAEL P. DOYLE
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), to review a final decision of the Department of Labor's Benefits Review Board, where petitioner filed his petition for review more than 60 days after the Board's decision became final.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is *reprinted in* 66 Fed. Appx. 491. The decisions of the Benefits Review Board (Pet. App. 11a-15a, 16a-19a, 20a-36a) and the administrative law judge (Pet. App. 37a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2003. A petition for rehearing was denied on December 9, 2003. Pet. App. 53a-54a. The petition for a writ of certiorari was filed on March 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903. Contested LHWCA claims are initially resolved by administrative law judges (ALJs), 33 U.S.C. 919(d), whose decisions are subject to review by the Benefits Review Board (BRB), 33 U.S.C. 921(b)(3). The BRB, which is comprised of five permanent members and up to four temporary members, 33 U.S.C. 921(b)(1) and (5), typically assigns appeals to three-member panels for disposition, 20 C.F.R. 801.301(b), 802.407(a).

Once a BRB panel renders a decision, an aggrieved party may seek BRB panel and/or en banc reconsideration by filing a motion within 30 days of the decision. 20 C.F.R. 802.407(a) and (b). In addition, any permanent BRB member may sua sponte call for en banc reconsideration of a panel's decision, which is granted upon the affirmative vote of three permanent members. 20 C.F.R. 802.407(c) and (d). Finally, an aggrieved party may seek review in the appropriate court of appeals by filing a petition for review within 60 days of the BRB's final decision. 33 U.S.C. 921(c). The timely filing of a motion for reconsideration with the BRB, however, tolls the time for filing a petition for review. 20 C.F.R. 802.406.

Since 1996, Congress has provided in successive appropriations laws that ALJ decisions appealed to the BRB automatically become final for purposes of judicial review if the BRB does not act upon them within one year of the appeal date. See, *e.g.*, Department of Labor Appropriations Act, 2002, Pub. L. No. 107-116, 115

Stat. 2177, 2185; *Ramey* v. *Stevedoring Servs. of America*, 134 F.3d 954, 957 (9th Cir. 1998). For example, Public Law No. 106-554, which covered the time period at issue here, provided:

> That no funds made available by this Act may be used by the Secretary of Labor to review a decision under the [LHWCA] that has been appealed and that has been pending before the Benefits Review Board for more than 12 months: *Provided further*, That any such decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-10.

2. Petitioner, Robert Holmes, filed a claim for disability benefits under the LHWCA due to an alleged work-related psychological impairment. Pet. App. 47a-48a. Following an evidentiary hearing, an ALJ entered an order denying petitioner's claim on February 3, 2000. *Id.* at 5a, 37a. Petitioner filed a timely appeal with the BRB on March 7, 2000. *Id.* at 5a.

On March 16, 2001, a three-member panel of the BRB entered a decision vacating the ALJ's decision and remanding the matter for further proceedings. Pet. App. 20a-34a. On April 4, 2001, however, the panel vacated its March 16 decision. *Id.* at 16a-17a. It explained that the decision should have been issued on or before March 6, 2001, but was not issued until March 16, 2001, because of a clerical error. *Ibid.* Consequently, the panel explained, the ALJ's decision became the

BRB's final decision as of March 7, 2001, by virtue of Public Law No. 106-554's one-year review deadline. *Ibid.* The panel advised that "any party aggrieved by the administrative law judge's decision may appeal the decision within 60 days of [March 7]" pursuant to 33 U.S.C. 921(c). Pet. App. 17a n.2.

Petitioner filed a motion for reconsideration with the BRB on April 9, 2001.[1] Pet. App. 66a. He argued that "equitable relief should be invoked to relieve [him] of the drastic consequences of a filing error by the Clerk of the [BRB]." *Ibid.* In addition, petitioner asked the BRB to reconsider the March 7 automatic affirmance according to the "established rules regarding a Petition for Reconsideration." *Id.* at 67a.

The BRB denied the motion on May 7, 2001. Pet. App. 11a-13a. It explained that the BRB does not have "equitable powers" and that Public Law No. 106-554 contained no provision authorizing the BRB to review an ALJ decision beyond the statutory one-year deadline. *Id.* at 12a-13a. The BRB thus concluded that it was "without authority to review the [ALJ]'s findings of fact and conclusions of law by way of a motion for reconsideration." *Id.* at 13a.

3. Petitioner filed a petition for review on June 8, 2001, which the court of appeals dismissed for lack of jurisdiction in an unpublished, per curiam opinion. Pet. App. 1a-10a. The court reasoned that the 60-day time limit for filing a petition for review commenced on

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[1] In a petition for rehearing filed with the court of appeals, petitioner argued that he filed his motion for reconsideration with the BRB on April 6, 2001. Pet. App. 58a-61a. The court of appeals, however, determined that the motion for reconsideration was filed with the BRB on April 9, and petitioner concedes in his petition for a writ of certiorari that he filed the motion on April 9. Pet. 4, 9; Pet. App. 66a.

March 7, the date on which the ALJ's decision became the BRB's final decision by operation of law. *Id.* at 8a. The court also determined that petitioner's April 9 motion for reconsideration did not toll the petition-filing deadline, because that motion was not filed within 30 days of March 7, 2001, and was therefore untimely. *Id.* at 9a. Finally, the court rejected petitioner's contention that the BRB's March 16 order was a sua sponte reconsideration of the March 7 automatic affirmance. *Id.* at 8a & n.3. Because petitioner did not seek judicial review within 60 days of March 7, the court concluded, the appeal was untimely and had to be dismissed. *Id.* at 8a-10a.

ARGUMENT

The court of appeals held in an unpublished decision that it lacked jurisdiction because petitioner filed his petition for review beyond the time limit prescribed in Section 21(c) of the LHWCA, 33 U.S.C. 921(c). That fact-bound decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that it lacked jurisdiction over this action because petitioner failed to timely file his petition for review. As the court of appeals explained, petitioner had "60 days from March 7, 2001, or until May 6, 2001, to petition [the court of appeals] for review of the ALJ's decision." Pet. App. 8a. Petitioner, however, "did not file his petition for review * * * until June 8, 2001," and the petition for review was, therefore, not timely filed. *Ibid.* As the court of appeals determined, moreover, petitioner's April 9 motion for reconsideration did not toll the time for filing a petition for review, because it was filed with the BRB more than 30 days after March 7. See *id.* at 9a; 20

C.F.R. 802.406, 802.407(a) (motion for reconsideration filed within 30 days of the BRB's final decision tolls the time for filing a petition for review in the court of appeals).[2] Under these circumstances, the court of appeals properly dismissed the petition for review because it lacked jurisdiction. See *Adkins* v. *Director, OWCP*, 889 F.2d 1360, 1361 (4th Cir. 1989) (holding that Section 21(c) of the LHWCA is a jurisdictional provision).

Petitioner contends that the BRB's March 16 decision "necessarily constituted a *de facto* reconsideration and modification" of the March 7 automatic affirmance "as permitted by 20 C.F.R. § 802.407." Pet. 4. Under that view, the March 16 decision tolled the time for filing a petition for review, and a new 60-day filing period began on April 4, the date on which the BRB vacated the March 16 decision. That filing period, in turn, was tolled on April 9, when petitioner filed his motion for reconsideration with the BRB. A new filing period then began on May 7, the date on which the BRB denied the motion for reconsideration. Because the petition for review was filed in the court of appeals within 60 days of May 7, petitioner contends that the court of appeals had jurisdiction.

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[2] In *Dailey* v. *Director, OWCP*, 936 F.2d 241, 242 (6th Cir. 1991), the court of appeals held that the regulatory 30-day time limit for filing a motion for reconsideration is not jurisdictional; thus, the BRB has the discretionary authority to extend the filing time and consider an otherwise untimely motion on its merits. *Dailey*, however, did not involve a circumstance under which an ALJ decision became the BRB's final decision by operation of law. In any event, *Dailey* has no application here because petitioner does not contend that the BRB abused its discretion by refusing to consider the motion for reconsideration on its merits.

This convoluted argument fails because the BRB's March 16 decision cannot be characterized as a "de facto" or sua sponte reconsideration of the March 7 automatic affirmance. As the court of appeals noted (Pet. App. 8a n.3), the BRB panel did not view its March 16 decision as a reconsideration order. Rather, the panel clearly intended to issue its decision prior to March 7 and within the one-year time frame for reviewing ALJ decisions. *Id.* at 16a-17a. Once the panel realized that the ALJ decision had become final by operation of law on March 7, it vacated the March 16 decision on the ground that it lacked authority to review ALJ decisions that are pending for more than one year. *Id.* at 11a-13a, 16a-17a. These facts show that the panel had no intention of reconsidering the March 7 decision.

Moreover, it is far from clear that the BRB even possessed authority to issue a sua sponte reconsideration order. Although the BRB's rules allow panels to act on reconsideration *motions*, 20 C.F.R. 802.407(a), and allow any permanent BRB member to seek en banc reconsideration sua sponte, 20 C.F.R. 802.407(c), nothing in the rules allows a panel to reconsider a final decision sua sponte.[3] That omission from a detailed procedural scheme suggests that a panel is not authorized to reconsider a decision absent the filing of an appropriate motion. In any event, that ambiguity regarding the BRB's reconsideration authority—which neither the court of appeals nor the BRB had occasion to address—counsels against further review of the court of appeals' fact-bound jurisdictional ruling.

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[3] The government is unaware of any BRB decisions addressing whether a panel has authority to reconsider its orders sua sponte.

2. There is no merit to petitioner's contention (Pet. 6-9) that the decision below conflicts with *Ramey* v. *Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). In *Ramey*, the Ninth Circuit held that a timely filed motion for reconsideration tolls the time for filing a petition for review in the court of appeals, even in cases where an ALJ's decision becomes the BRB's final decision by operation of law. *Id.* at 959 (construing Public Law No. 106-554's predecessor, Public Law No. 104-134, 110 Stat. 1321). It was undisputed in *Ramey* that petitioners filed timely motions for reconsideration with the BRB. 134 F.3d at 957. Here, in contrast, the court of appeals determined that petitioner's motion for reconsideration was not timely filed. *Ramey* is therefore inapposite, and the court of appeals correctly distinguished it on that ground. Pet. App. 9a.

3. Finally, petitioner contends (Pet. 9-11) that the decision below conflicts with various decisions from this Court. Petitioner is incorrect.

a. Petitioner first alleges a conflict with *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978). *Hill*, however, had nothing to do with jurisdiction under the LHWCA, but instead concerned the effect of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, on the construction of a dam that threatened an endangered species' habitat. 437 U.S. at 171-172. In the course of resolving that issue, this Court applied the longstanding canon of statutory construction disfavoring implied repeals of statutes by appropriations acts. *Id.* at 189-190. Petitioner argues that the court of appeals violated that principle by construing Public Law No. 106-554 as impliedly repealing the regulations that govern reconsideration of BRB decisions.

Petitioner misconstrues the decision below. The court of appeals did not suggest that Public Law No.

106-554 repealed the BRB's regulations governing reconsideration of its own decisions. Instead, the court properly concluded, based upon Public Law No. 106-554's plain language, that the BRB's March 16 order had no legal effect because the ALJ's decision had become final on March 7. Pet. App. 8a. That conclusion was consistent with appellate decisions construing Public Law No. 106-554's predecessor. See *Burton* v. *Stevedoring Servs. of Am.*, 196 F.3d 1070, 1072-1074 (9th Cir. 1999) (BRB decision remanding matter to ALJ was a "nullity" where BRB issued the decision outside Public Law No. 104-134's prescribed time frame); *Director, OWCP* v. *Sun Ship, Inc.*, 150 F.3d 288, 291-292 (3d Cir. 1998) (same). No conflict with *Hill* exists, and consequently further review is not warranted.

b. Petitioner similarly errs in contending (Pet. 10) that the decision below conflicts with *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and *Bowman* v. *Loperena*, 311 U.S. 262 (1940). Both cases are inapposite.

Locomotive Engineers stands for the proposition that, when an administrative tribunal reopens a case and issues a new decision upon reconsideration of a previously entered order, the new decision is subject to review on its merits. 482 U.S. at 278. That proposition does not apply here because the BRB did not reopen the case and issue a new decision after the ALJ decision was rendered final on March 7. Although the BRB panel did issue a decision on March 16 purporting to reverse the ALJ's decision, it promptly vacated that March 16 decision once it realized that the ALJ's decision had been rendered final by operation of law. Pet. App. 16a-17a. Thus, the BRB's March 16 decision did not "reopen" the case in the sense contemplated by the Court in *Locomotive Engineers*.

In *Bowman*, the Court applied the rule that, when a lower court entertains an untimely petition for rehearing on its merits, the time for filing an appeal does not begin to run until the court rules on the rehearing petition. *Bowman*, 311 U.S. at 266 ("where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof"); see *Director, OWCP* v. *Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990) (holding that the rule in *Bowman* applies to BRB proceedings). That rule has no application in this case because the BRB did not entertain petitioner's motion for reconsideration on its merits; rather, it found that it lacked authority to do so. Pet. App. 13a. Thus, there is no conflict with *Bowman*, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor of Labor

MICHAEL P. DOYLE
Attorney
Department of Labor

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No. 03-1288

SUPREME COURT, U.S.
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In The Supreme Court of the United States

ROBERT HOLMES,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Avery T. Waterman, Jr.
Counsel of Record
Jennifer West Vincent
PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.
NationsBank Building
12350 Jefferson Avenue, Suite 300
Newport News, Virginia 23602
(757) 223-4555

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATUTES, RULE AND REGULATIONS

20 C.F.R. § 802.407 provides, in pertinent part:

> (a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to Section 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.
>
> (c) Except as provided in Sec. 801.301(d), even where no party has suggested reconsideration *en banc*, any permanent member may petition the permanent Board for reconsideration *en banc* of a panel decision.
>
> (d) Reconsideration *en banc* shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

Fed. R. App. P. 32.1 Citation of Judicial Dispositions (proposed) provides:

> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, order, judgments, or other written dispositions that have been designated as "unpublished", "not for publication", "non-

> precedential", "not precedent", or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

E-Government Act of 2002, Pub.L. 107-347, 205(a)(5), 116 Stat. 2899, 2913 provides, in pertinent part:

> (a) Individual Court Websites. - The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:
>
> > (5) Access to the substance of all written opinions written by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

ARGUMENT

Respondent VIT incorrectly represents that regardless of how the conflicts of legal authority identified by Petitioner are resolved, the outcome of this case would be the same. Respondent VIT mischaracterizes the position of Petitioner, focusing myopically on Petitioner's motion for reconsideration not having been filed within 30 days of BRB's initial decision by operation of law on March 7, 2001 (and ignoring BRB's 3/16/01 Decision and Order, its 4/4/01 Order of vacation, and the legal effects thereof). VIT Opp. Brief at 5.

Even Respondent DOWCP disagrees by implication, concisely summarizing Petitioner's position as follows:

> Petitioner contends that the BRB's March 16 decision 'necessarily constituted a *de facto* reconsideration and modification' of the March 7 automatic affirmance 'permitted by 20 C.F.R. § 802.407.' Pet. 4. Under that view, the March 16 decision tolled the time for filing a petition for review, and a new 60-day filing period began on April 4, the date on which the BRB vacated the March 16 decision. That filing period, in turn, was tolled on April 9, when petitioner filed his motion for reconsideration with the BRB. A new filing period then began on May 7, the date on which the BRB denied the motion for reconsideration. Because the petition for review was filed in the court of appeals within 60 days of May 7, petitioner contends that the court of appeals had jurisdiction.

DOWCP Opp. Brief at 6. Respondent DOWCP simply takes issue with BRB's 3/16/01 Decision and Order being a *de facto* or *sua sponte* reconsideration and questions whether BRB had any authority for reconsideration.

Petitioner refers the Court to the second paragraph of footnote 2 of his Petition at 8, which addresses the assertion of Respondents that BRB's 3/16/01 Decision and Order was not a *de facto* or *sua sponte* reconsideration. Restated very simplistically, the "intention" of BRB is utterly irrelevant; the indisputable fact is that BRB issued a new and different determination upon consideration of the merits after its automatic affirmance by operation of law.

The pivotal issue is whether BRB "possessed authority to issue a *sua spoute* reconsideration order." DOWCP Opp. Brief at 7. Respondents claim BRB's 3/16/01 unanimous Decision and Order on the merits is void and, correspondingly, did not trigger new filing deadlines. Conversely, Petitioner champions that BRB possessed such authority and, consequently, that the 3/16/01 Decision and Order was valid and reset the clock for him subsequently moving for reconsideration of its vacation thereof and petitioning for review of the denial thereof. Petitioner is correct on the core issue.

Dispositively, as all administrative agencies, BRB inherently has power to reconsider and to modify *sua spoute*. *E.g. Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("[W]e believe such power is implicit [even absent 'any statute or regulation expressly authorizing']. Administrative agencies have

an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[E]very tribunal, judicial or administrative, has power to correct its own errors or otherwise appropriately to modify its judgment."); *Albertson v. FCC*, 182 F.2d 397 (D.C. Cir. 1950); *Cf., O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 354, 356 (1971) (*per curiam*) (holding in a BRB case that an ALJ can reconsider and modify an order on "merely further reflection on the evidence initially submitted").

THE FOURTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH OTHER CIRCUITS ON THE SAME IMPORTANT MATTER

Respondent VIT contends that the opinion *sub judice* has "little, if any precedential value," because it is "unpublished."[1] Its contention is bereft of any supporting legal authority, is not joined by Respondent DOWCP, and is incorrect.

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[1] The "unpublished" opinion *sub judice* actually is published in various places readily accessible to all courts, other litigants and the public at large. Through Lexis, it is published as *Holmes v. DOWCP*, 2003 U.S. App. LEXIS 11646 (June 12, 2003)(unpublished). Pursuant to the E-Government Act of 2002, Pub. L. 107-347, 205(a)(5), 116 Stat. 2899, 2913, the Fourth Circuit itself publishes the opinion on its website, www.ca4.uscourts.gov, at http://pacer.ca4.uscourts.gov/opinion.pdf/011761.U.pdf. Finally, the opinion is published in the new reporter for all "unpublished" federal circuit courts of appeals decisions since 2001, Federal Appendix, *Holmes v. DOWCP*, 66 Fed. Appx. 491 (4th Cir. 2003)(unpublished).

Even within the issuing Fourth Circuit Court of Appeals, its citation only is "disfavored" not prohibited. Moreover, ironically, in the majority of all other federal circuit courts, the Fourth Circuit's opinion is citable as authority. Proposed Rule 32.1 of the Federal Rules of Appellate Procedure, Citation of Judicial Dispositions, which was approved by the Judicial Conference Advisory Committee in 2003 upon the suggestion of the Solicitor General in 2001, is slated for use in 2005. 5/22/03 Report of Advisory Committee on Appellate Rules. 1a. The Advisory Committee Report debunks the fallacies and shortcomings surrounding unpublished opinions, which comprise about 80% of the opinions issued by the circuit courts in recent years. This Court properly grants writs of *certiorari* on unpublished opinions to resolve splits among the courts of appeals. *E.g., Swierkiewicz v. Sorena N.A.*, 534 U.S. 506 (2002).[2]

Although Respondents want to distinguish *Ramey v. Stevedoring Servs. of Am.*, 134 F.2d 954 (9th Cir. 1998) purely on factual grounds, the differences in fact simply do not reconcile the Fourth Circuit's opinion with *Ramey*. *Ramey's* basic holding that BRB retains jurisdiction to reconsider even after its "final" decision by operation of law squarely conflicts with the Fourth Circuit's basic holding that a "final" decision by operation of law rendered BRB without jurisdiction and any reconsideration by it "void"! Unlike in *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931),

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[2] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923), cited by Respondent VIT, is inapposite. The two circuit court opinions therein "were really in harmony and not in conflict" on patent validity. 261 U.S. 392.

the difference between *Ramey* and the Fourth Circuit's opinion is "in application of a principle of law" and not simply "in states of fact."

Significantly, however in addition to conflicting with *Ramey*, the Fourth Circuit's opinion also conflicts with the opinions of the Tenth Circuit and other circuits, *supra*, on the inherent power of all administrative agencies to reconsider and change their orders. The analogous facts of *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084 (10th Cir. 1980) are instructive. In *Trujillo*, the Equal Employment Opportunity Commission ("EEOC") issued a determination and Notice of Right-to-Sue on December 2, 1976; but on January 24, 1997, reconsidered and issued a revised determination. 621 F.2d at 1085. The employer argued that EEOC lacked authority to reconsider and change its determination and that the 90-day time limit for its employee filing suit ran from the date of issuance of the initial determination. The Tenth Circuit rejected that analysis, observing that "[a]dministrative agencies have an inherent authority to reconsider their own decisions," and holding that the reconsideration reset the limitation time clock to run from the later date of issuance of the revised determination. 621 F.2d at 1086. Obviously, this conflicts with the Fourth Circuit's opinion that BRB's 3/16/01 Order and Decision and its subsequent vacation thereof did not trigger new deadlines for Petitioner moving for reconsideration thereof and subsequently petitioning for review of the denial thereof.

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

By its conspicuous silence on the point, Respondent VIT concedes that the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Contrarily, Respondent DOWCP does not. But it does concede that the Court's decisions at issue do stand for the legal propositions for which Petitioner cited them, and simply claims (incorrectly) nonetheless that they do not apply to the matter *sub judice*.

Respondent DOWCP concedes that *TVA v. Hill*, 437 U.S. 153 (1970) reaffirmed "the longstanding canon of statutory construction disfavoring implied repeals of statutes by appropriations acts." It then claims that the Fourth Circuit did not impliedly repeal the BRB's regulatory authority (to reconsider and enter a new order) by invoking Public Law No. 106-554 as supreme and preemptive. DOWCP Opp. Brief at 8-9. But indisputably, the Fourth Circuit summarily concluding the aforesaid appropriations law rendered BRB's 3/16/01 Decision and Order on the merits void and ineffective is tantamount to an implied repeal of BRB's regulatory right (and inherent power) to reconsider *sua sponte*. *TVA* applies; the Fourth Circuit conflicts.

Respondent DOWCP also concedes that *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1986) "stands for the proposition that, when an administrative tribunal reopens a case and issues a new

decision upon reconsideration of a previously entered order, the new decision is subject to review on its merits." It then claims that "BRB's March 16 decision did not 'reopen' the case in the sense contemplated by the court in *Locomotive Engineers*". DOWCP Opp. Brief at 9. But indisputably the BRB reopened this case in fact by issuing its 3/16/01 Decision and Order *sua spoute* and this Court did not limit how a case could be reopened. *Locomotive Eng'rs* applies; again the Fourth Circuit conflicts.

Respondent DOWCP additionally concedes that *Bowman v. Loperena*, 311 U.S. 262 (1940) held "where the court allows the filing [late] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof." It then claims no applicability to the matter *sub judice*, by focusing myopically ōn the motion for reconsideration. DOWCP Opp. Brief at 10. But indisputably the key "late" case activity that resets all of the subsequent time deadlines is BRB's 3/16/01 Decision and Order. *Bowman* applies; again, the Fourth Circuit conflicts.

Finally, the Fourth Circuit's opinion conflicts with *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 354 (1971)(*per curiam*). In *O'Keefe*, a BRB case, this Court held that an ALJ can reconsider and modify an order on "merely further reflection on the evidence initially submitted." 404 U.S. at 356. Contrarily, the Fourth Circuit found administrative reconsideration and modification *sua sponte* "void."

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The matter *sub judice* is not merely a "fact-bound decision," DOWCP Opp. Brief at 5; or "of importance [only] to . . . the parties". VIT Opp. Brief at 2. Respondent, DOWCP cites no authority; and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) on which Respondent VIT relies solely is inapposite. *Rice* found the grant of a writ improvident where a remedial statute precluded the unique, highly personalized issue from ever arising again and, thereby, rendered the case one of "isolated significance" (to only the parties).

Unlike *Rice*, if allowed to stand, this case history easily can (and probably will) repeat itself. Moreover, this case has general applicability not only to other cases of BRB acting after the one year window of Pub. Law 106-554 (and its successor enactments), but also to cases of other administrative tribunals acting beyond their respective appropriations law windows. It is important that the regulatory rights/responsibilities (and inherent power) of administrative tribunals to modify their decisions *sua spoute* be vindicated.

CONCLUSION

For the foregoing reasons, Petitioner prays, the Court issue a writ of *certiorari*.

Respectfully submitted,
ROBERT HOLMES

Avery T. Waterman, Jr., Esq.
Jennifer West Vincent, Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
(757) 223-4555 TEL
(757) 249-3242 FAX
Counsel for Petitioner

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Memorandum to
The Honorable Anthony J. Scirica from
The Honorable Samuel A. Alito, Jr.
Re: Report of Advisory Committee on
Appellate Rules
filed May 22, 2003 ..... 1a

MEMORANDUM

DATE: May 22, 2003

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

[FILED: MAY 22, 2003]

I. Introduction

The Advisory Committee on Appellate Rules met on May 15, 2003, in Washington, D.C. At its meeting, the Advisory Committee approved three proposed amendments, removed two proposals from its study agenda, and agreed to continue to study several other proposals. Detailed information about the Advisory Committee's activities can be found in the minutes of the May 15 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

Pursuant to the request of the Standing Committee, the Advisory Committee has not forwarded proposed amendments to the Standing

Committee in a piecemeal fashion, but instead has collected proposed amendments to present to the Standing Committee at one time. The last group of proposed amendments to the Appellate Rules were published in August 2000 and took effect in December 2002. The Advisory Committee now seeks the Standing Committee's approval to publish another group of proposed amendments in August 2003.

(Items not related to New Rule 32.1 omitted)

E. New Rule 32.1

The Advisory Committee proposes to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," non-precedential," or the like. New Rule 32.1 would also require parties who cite "unpublished" or "non-precedential" opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties. The Advisory Committee makes this proposal for two reasons:

First, the local rules of the circuits differ dramatically in their treatment of the citation of "unpublished" or "non-precedential" opinions for their persuasive value. Some circuits freely permit such citation, some circuits disfavor such citation but permit it in limited circumstances, and some circuits do not

permit such citation under any circumstances. These conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit.

Second, the Advisory Committee believes that restrictions on the citation of "unpublished" or "non-precedential" opinions the violation of which can lead to sanctions or to formal charges of unethical conduct C are wrong as a policy matter. The Advisory Committee defends its position at length in the Committee Note, so I will say no more about it here.

Needless to say, this is a controversial matter. Many attorneys and bar organizations are strongly opposed to no-citation rules; indeed, Dean Schiltz tells me that no issue has generated more correspondence to the Advisory Committee over the past six years. Although many judges have also expressed their opposition to no-citation rules in fact, several circuits do not have such rules other judges are passionate in defending such rules. If the Standing Committee approves proposed Rule 32.1 for publication, we will undoubtedly receive a substantial number of comments.

I want to stress here as I have stressed in prior communications to the Standing Committee that proposed Rule 32.1 is extremely limited. It takes no position on whether designating opinions as "unpublished" or "non-precedential" is constitutional. It does not require any court to issue and"unpublished" or "non-precedential" opinion, nor does it forbid any court from doing so. It does not dictate the circumstances under which a court may

choose to designate an opinion as "unpublished" or Anon-precedential." Most importantly, it says nothing whatsoever about the effect that a court must give to one of its own "unpublished" or "non-precedential" opinions or to the "unpublished" or "non-precedential" opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as "unpublished" or Anon-precedential."

The Advisory Committee approved proposed Rule 32.1 at our May 2003 meeting by vote of 7 to 1, with one abstention.

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, order, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," Anon-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that

"unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-1368 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double

jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may

not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions "published" and "unpublished."

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearean sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions including "unpublished" decisions on its website. *See* E-Government Act of 2002, Pub. L. 107-347, '205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of

the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to

admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First

Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve a copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).